No. 96-6839-CFY
Status: GRANTED

Title: Hugo Roman Almendarez-Torres, Petitioner
v.
United States

Docketed:
November 25, 1996

Court: United States Court of Appeals for the Fifth Circuit

See also:
96-6148
96-6234
96-6419
96-6567
96-6647

Counsel for petitioner: Fleury,Peter

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 20 1996	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 21, 1997)
3	Dec 2 1996		Waiver of right of respondent United States to respond filed.
4	Dec 5 1996		DISTRIBUTED. January 3, 1997 (Page 14)
5	Dec 23 1996	F	Response requested -- CJ.
6	Jan 16 1997		Order extending time to file response to petition until February 21, 1997.
7	Feb 20 1997		Brief of respondent United States in opposition filed.
8	Mar 6 1997		REDISTRIBUTED. March 21, 1997 (Page 5)
10	Mar 24 1997		REDISTRIBUTED. March 26, 1997 (Page 12)
12	Mar 31 1997		Petition GRANTED. SET FOR ARGUMENT October 14, 1997. **********
14	Apr 15 1997		Order extending time to file brief of petitioner on the merits until June 16, 1997.
15	May 27 1997		Joint appendix filed.
16	Jun 13 1997		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
17	Jun 16 1997		Brief of petitioner Hugo Roman Almendarez-Torres filed.
19	Jul 15 1997		Order extending time to file brief of respondent on the merits until July 23, 1997.
20	Jul 23 1997		Brief of respondent United States filed.
21	Jul 28 1997		CIRCULATED.
22	Aug 14 1997	D	Application (A97-142) to extend the time to file a reply brief from August 25, 1997 to September 8, 1997 by petitioner, submitted to Justice Scalia.
24	Aug 18 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fifth Circuit.
23	Aug 21 1997		Application (A97-142) denied by Justice Scalia.
25	Aug 25 1997	X	Reply brief of petitioner Hugo Roman Almendarez-Torres filed.
26	Sep 2 1997		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Texas. (SEALED ENVELOPE)

(2) ORIGINAL

NO. 96-6839

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted,

IRA R. KIRKENDOLL
Federal Public Defender

BY: _____
PETER FLEURY
Asst. Federal Public Defender
TX State Bar No. 07145600
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
817/978-2753

ATTORNEY FOR PETITIONER,
HUGO ROMAN ALMENDAREZ-TORRES

17 pp

QUESTIONS PRESENTED

I. DOES A SENTENCING COURT VIOLATE DUE PROCESS BY DETERMINING TITLE 8 U.S.C. § 1326(b)(2) IS NOT A SEPARATE OFFENSE FROM TITLE 8 U.S.C. § 1326, BUT MERELY A SENTENCING ENHANCEMENT?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

RULES

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals decided and filed August 22, 1996.

OPINION BELOW

The opinion of the Court of Appeals is unreported pursuant to Fifth Circuit Local Rule 47.5. The unpublished manuscript opinion is attached as Appendix A.

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was filed on August 22, 1996. This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision at issue in Question 1 of this petition, 8 U.S.C. § 1326, is set forth in Appendix B to this petition.

STATEMENT OF THE CASE

The United States District Court, Northern District of Texas, Fort Worth Division, had jurisdiction pursuant to Title 18, United States Code, § 3231.

A. Proceedings Below

On September 12, 1995, the appellant, Hugo Roman Almendarez-Torres (hereinafter "Almendarez-Torres") was charged by indictment with illegal re-entry into the United States after deportation, in violation of Title 8, United States Code, Section 1326. On December 1, 1995, Almendarez-Torres pleaded guilty before the Honorable John McBryde, in the Northern District of Texas, Fort Worth Division. On March 1, 1996, Judge McBryde sentenced Almendarez-Torres to a term of imprisonment of 85 months, plus a term of two (2) years supervised release. Almendarez-Torres filed a timely Notice of Appeal, and an appeal followed.

Oral argument was not held in this case, and on August 22, 1996, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming the judgment of the district court. United States v. Hugo Roman Almendarez-Torres, (No. 96-10254) (5th Cir., August 22, 1996) (unpublished) (copy of opinion attached as Appendix A).

Facts relating to Question I

HUGO ROMAN ALMENDAREZ-TORRES is a national of Mexico, having been born in Villa Hidalgo, San Luis Potosi, Mexico on August 9, 1971.

On March 11, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offense of Burglary of a Habitation in Cause Number 0432394D. On July 26, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offenses of Burglary of a Habitation in Cause Numbers 0444757A and 0437963A. On March 14, 1991 the defendant was convicted in a Criminal District Court of Dallas County, Texas for the offense of Burglary of a Habitation in Case Number F-91-29541-UH.

The defendant, on April 18, 1992 was deported from the United States to Mexico at Brownsville, Texas pursuant to his convictions.

REASONS FOR GRANTING THE WRIT
Overview

At issue in this case is whether two subsections of a statute, Title 8 U.S.C. § 1326(a) and § 1326(b) are dependent on one another, or whether each subsection is a separate offense with elements that must be proven beyond a reasonable doubt. At least two intermediate appellate courts have arrived at conflicting answers to this question.

The Fifth Circuit has held that defendants convicted under 8 U.S.C. § 1326(a) can be sentenced under § 1326(b)(2) upon mere proof to the sentencing court by a preponderance of the evidence, because subsection (b) is merely a sentencing enhancement of subsection (a). United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). Contrarily, the Ninth Circuit has held that prosecutors must prove all elements of subsection (b) beyond a reasonable doubt before a defendant is subject to the fifteen-year maximum sentence provided for by § 1326(b)(2). United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992).

Recently, **the Supreme Court ordered the Solicitor General to brief this very issue in response to a petition for Certiorari** in United States v. Najera-Ojeda, No. 96-6148.

Accordingly, this Court should grant certiorari to consider the following question:

I. DOES A SENTENCING COURT VIOLATE DUE PROCESS BY DETERMINING TITLE 8 U.S.C. § 1326(b)(2) WAS NOT A SEPARATE OFFENSE FROM TITLE 8 U.S.C. § 1326, BUT MERELY A SENTENCING ENHANCEMENT?

Argument

I. DOES A SENTENCING COURT VIOLATE DUE PROCESS BY DETERMINING TITLE 8 U.S.C. § 1326(b)(2) IS NOT A SEPARATE OFFENSE FROM TITLE 8 U.S.C. § 1326(a), BUT MERELY A SENTENCING ENHANCEMENT?

In United States v. Vasquez-Olvera, a divided Fifth Circuit panel determined that 8 U.S.C. § 1326(b) is a sentencing-enhancement factor for 8 U.S.C. § 1326(a). United States v. Vasquez-Olvera, 999 F.2d 943, 945 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). In so doing, the court relied on the criteria enunciated in United States v. Davis, 801 F.2d 754 (5th Cir. 1986). Under the Fifth Circuit's evaluation, 1326(b) meets the four elements of the Davis test, "(1) whether the statute predicates punishment upon conviction under another section, (2) whether the statute multiplies the penalty received under another section, (3) whether the statute provides guidelines for the sentencing hearing, and (4) whether the statute is titled as a sentencing provision." United States v. Vasquez-Olvera, 999 F.2d at 945, citing Davis, id. at 756.

The Fifth Circuit contends that 8 U.S.C. § 1326(b) meets criteria numbers 1, 2, and 4. Vasquez-Olvera, 999 F.2d at 945. Undaunted by the missing element, the Fifth Circuit concluded, "Subsection (b) meets three of the four Davis factors and has enough of the common traits of a sentence enhancement provision for us to conclude that Congress intended for it to be a sentence enhancement provision." Vasquez-Olvera, 999 F.2d at 945.

The Fifth Circuit relied heavily on the fact that Congress included the following words in the statute: "subject to subsection (b) of this section" and "notwithstanding subsection (a) of this section." The Fifth Circuit also stated, "It is highly unlikely that Congress would structure the statute in such a way that subsection (b) is dependant [sic] on elements of subsection (a), if it intended for subsection (b) to be a separate criminal offense." Vasquez-Olvera, 999 F.2d at 946.

In her dissent, Judge King expressed skepticism toward the majority's reasoning:

> I believe that, while the majority's interpretation is a permissible one, there is another, equally permissible interpretation of the statute...In this regard, I observe that subsection (b) states that it appears "in the case of any alien described in" subsection (a). It does not say "in the case of any alien convicted of" the offense set forth in subsection (a). I further

> believe that the use of the phrase "[n]otwithstanding subsection (a)," if anything, argues in favor of holding that the drafters of subsection (b) intended it to be a separate offense.

Id. at 948 (emphasis in original).

The Fourth Circuit, following Vasquez-Olvera, held, "[T]he plain language of § 1326 indicates that subsection (b) is a sentence enhancement provision rather than a separate offense." United States v. Crawford, 18 F.3d 1173, 1178 (4th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 171 (1994). The First Circuit has also held in accordance with the Fourth and Fifth Circuits. See United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994); United States v. Smith, 36 F.3d 128 (1st Cir.), cert. denied, ___ U.S. ___ 115 S.Ct. 529 (1994). Contrarily, the Ninth Circuit has held, in a series of cases, that 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b) are separate offenses. See United States v. Arias-Granados, 941 F.2d 996 (9th Cir. 1991); United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992); United States v. Gonzalez-Medina, 976 F.2d 570 (9th Cir. 1992).

Due process compels the Ninth Circuit's interpretation. This Court held in In Re Winship, 397 U.S. 358 (1970) that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, id. at 364. Additionally, under McMillan v. Pennsylvania, 477 U.S. 79 (1986), a higher standard of proof is required where a statute either changes a maximum penalty or creates a new offense with its own penalty. McMillan, id. at 88.

Because § 1326(a) provides for a two-year statutory maximum sentence and § 1326(b) provides for a fifteen-year statutory maximum sentence, due process demands the prior conviction be proven beyond a reasonable doubt. See McMillan, id. Almendarez-Torres' prior conviction was not proved beyond a reasonable doubt. Accordingly, in the absence of proof beyond a reasonable doubt of the prior conviction necessary to constitute a violation of § 1326(b)(2), Almendarez-Torres may not be sentenced to more than the two-year maximum provided for in § 1326(a).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

IRA R. KIRKENDOLL
Federal Public Defender

BY: _____
PETER FLEURY
Asst. Federal Public Defender
TX State Bar No. 07145600
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
817/978-2753

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 22 1996
CHARLES R. FULBRUGE III
CLERK

No. 96-10254
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO ROMAN ALMENDAREZ-TORRES,

Defendant-Appellant.

- - - - - - - - - - -

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:95-CR-124-A

- - - - - - - - - - -

Before KING, DUHÉ, and DeMOSS, Circuit Judges.

PER CURIAM:*

Hugo Roman Almendarez-Torres appeals his judgment of conviction and sentence after pleading guilty to reentry after deportation in violation of 8 U.S.C. § 1326. He argues that he was charged with and pleaded guilty to § 1326(a), simple reentry, but that he was sentenced as if he had pleaded guilty to reentry following a conviction for an aggravated felony for purposes of § 1326(b)(2). His argument is foreclosed by this court's opinion

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

in United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994).

AFFIRMED.

APPENDIX B

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

(As amended Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7345(a), 102 Stat. 4471; Nov. 29, 1990, Pub.L. 101-649, Title V, § 543(b)(3), 104 Stat. 5059; Sept. 13, 1994, Pub.L. 103-322, Title XIII, § 130001(b), 108 Stat. 2023.)

ORIGINAL

(3)

No. 96-6839

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HUGO ROMAN ALMENDAREZ-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General

MARK M RICHARD
Acting Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 1326 of Title 8 of the United States Code imposes criminal penalties on deported aliens who reenter the country illegally. Section 1326(a) provides for a maximum prison term of two years for violation of the statute, subject to the provisions of subsection (b). Section 1326(b) provides for enhanced maximum terms for violators whose previous deportation followed a felony conviction or three misdemeanor convictions for specified offenses. The question presented is:

Whether Section 1326(b) defines an offense separate from that defined in Section 1326(a), so that an alien defendant's previous conviction or convictions must be alleged in the indictment and proved at trial before an enhanced sentence may be imposed.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-6839

HUGO ROMAN ALMENDAREZ-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. A) is unpublished, but the judgment is noted at 96 F.3d 1443 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1996. The petition for a writ of certiorari was filed on November 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of illegally reentering the United States as a deported alien, in

violation of 8 U.S.C. 1326. He was sentenced to 85 months' imprisonment. The court of appeals affirmed. Pet. App. A.

1. In 1991, petitioner, a citizen of Mexico, was convicted on three separate occasions in Texas state courts of burglary of a habitation. He was thereafter deported from the United States on April 18, 1992. In June 1992 petitioner illegally returned to the United States by crossing the Rio Grande River near Laredo, Texas. On July 28, 1995, an agent of the United States Border Patrol found petitioner at a jail in Tarrant County, Texas, where petitioner was incarcerated on unrelated charges. Petitioner had not obtained permission from the Attorney General to reenter the United States. Gov't C.A. Br. 4-5.

Petitioner subsequently pleaded guilty to being found unlawfully in the United States on July 28, 1995, after having been previously arrested and deported, in violation of 8 U.S.C. 1326. Section 1326(a) provides for a maximum prison term of two years for a violation of the statute, subject to the provisions of subsection (b). Section 1326(b)(1) provides for a maximum term of 10 years' imprisonment of offenders whose deportation follows a felony conviction (other than a conviction for an "aggravated felony") or three misdemeanor convictions for specified offenses. Section 1326(b)(2) provides for a maximum term of 20 years' imprisonment of offenders whose deportation follows a conviction for an "aggravated felony," as defined in 8

U.S.C. 1101(a)(43).[1] Because petitioner had been convicted of aggravated felonies before his deportation (his three 1991 Texas burglary convictions), the district court sentenced him pursuant to Section 1326(b)(2) to a term of 85 months' imprisonment.

2. The court of appeals affirmed. Pet. App. A. Relying on its earlier opinion in United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994), the court rejected petitioner's claim that the imposition of sentence pursuant to Section 1326(b)(2) was unlawful because his prior aggravated felony convictions had not been alleged in the indictment. Vasquez-Olvera had held that because Section 1326(b)(2) provides only for sentencing enhancement, and does not establish a separate offense, the indictment need not contain an allegation that the defendant committed a felony before his deportation. 999 F.2d at 945-946.

ARGUMENT

Petitioner contends that Sections 1326(a) and 1326(b) create separate offenses, and that the imposition of sentence under the higher maximum penalty provisions of Section 1326(b) was unlawful because the indictment did not allege his prior aggravated felony convictions as an element of the offense. That claim is

---

[1] After petitioner's offense, Congress amended Section 1326 on two occasions, but the changes effected by those amendments are not relevant to the disposition of this case. See Pub. L. No. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279 (April 24, 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Title III §§ 308(d)(4)(J), 324, 110 Stat. 1570, 1685, 1704 (September 30, 1996).

incorrect and does not merit review by this Court. The Court has previously denied petitions for certiorari in at least twelve cases raising the same issue,[2] and there is no reason for a different result here.

1. Subsection (a) of 8 U.S.C. 1326 provides that "[s]ubject to subsection (b) of this section," any previously arrested and deported alien who reenters or is found in the United States without specific permission (or without demonstrating that such permission was not required) shall be subject to a fine and to imprisonment "of not more than two years." Subsection (b) provides that "[n]otwithstanding subsection (a) of this section, in the case of any alien described in such subsection" whose previous deportation followed a felony conviction, or three misdemeanor convictions for specified offenses, the maximum term of imprisonment shall be 10 or 20 years, depending on whether the

[2] See Collado v. United States, cert. denied, 116 S. Ct. 1572 (1996); Velasquez-Velasquez v. United States, cert. denied, 116 S. Ct. 928 (1996); Palacios-Casquete v. United States, 116 S. Ct. 927 (1996); Rijo-Montas v. United States, 116 S. Ct. 89 (1995); Cole v. United States, 115 S. Ct. 497 (1994); Crawford v. United States, 115 S. Ct. 171 (1994); Ponce-Santoyo v. United States, 115 S. Ct. 122 (1994); Rivas-Gaytan v. United States, 114 S. Ct. 2142 (1994); Hernandez v. United States, 114 S. Ct. 2141 (1994); Trevizo-Ortiz v. United States, 114 S. Ct. 2141 (1994); Valenzuela-Lopez v. United States, 114 S. Ct. 2140 (1994); Vasquez-Olvera v. United States, 510 U.S. 1076 (1994).

alien had been convicted of an "aggravated felony."[3] The term "aggravated felony" is defined in 8 U.S.C. 1101(a)(43).

[3] At the time of petitioner's offense, Section 1326 provided as follows:

> Reentry of deported alien; criminal penalties for reentry of certain deported aliens
>
> (a) Subject to subsection (b) of this section, any alien who--
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.
>
> (b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--
>
> (1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both; or
>
> (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both.
>
> For the purposes of this subsection, the term "deportation" includes any agreement in which the alien stipulates to deportation during a criminal trial under either Federal or State law.

Nothing in the wording of the statute suggests that subsection (b) creates an offense separate from that described in subsection (a).[4] Section 1326 describes one offense with three possible maximum sentences. The elements of the offense -- arrest or exclusion, deportation, reentry into the United States, and lack of advance consent or of proof that such consent was unnecessary -- are all set forth in subsection (a), and not in subsection (b). The maximum penalties generally applicable to aliens found to have violated the elements in subsection (a) are set forth in that subsection, except that the subsection (a) maximum penalty is "[s]ubject to subsection (b)," providing for higher penalties in limited circumstances. Subsection (b) prescribes additional sentences that may be imposed, "[n]otwithstanding subsection (a)," where the defendant was convicted, before deportation, of a felony. Section 1326 is thus structured as an offense with a generally applicable maximum penalty, followed by a penalty enhancement provision.

Further, as the court of appeals observed in Vasquez-Olvera, the title of Section 1326 supports the conclusion that Section 1326(b) is a penalty enhancement provision. 999 F.2d at 945 & n.4; see INS v. National Ctr. for Immigrants' Rights, 502 U.S. 183, 189 (1991) (title of statute may be considered in discerning meaning of statute). Before subsection (b) was added, Section 1326 was titled "Reentry of deported alien." See 8 U.S.C. 1326

[4] Section 1326(b), and the introductory clause of Section 1326(a), were added to the statute by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7345(a), 102 Stat. 4471.

(1982). The 1988 amendment that added the enhanced sentencing provisions appended the following phrase to the title: "--criminal penalties for reentry of certain deported aliens." See 8 U.S.C. 1326 (1988 & Supp. V 1993); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7345(a), 102 Stat. 4471. That appended phrase, like the introductory cross-references to each of the new subsections in the statute itself, suggests that the amendment was intended to modify "penalties" for "certain" violations of the existing statute, not to create a new and separate crime.[5]

The penalty provisions of Section 1326(b) are comparable to those of 21 U.S.C. 841(b), which specifies graduated penalties for violations of Section 841(a)'s prohibitions on possession or distribution of controlled substances, depending on the type and amount of the substance involved and on the defendant's history of prior convictions. United States v. Cole, 32 F.3d 16, 18-19 (2d Cir.), cert. denied, 115 S. Ct. 497 (1994). The Second

[5] No Senate or House committee report was submitted with the lengthy final legislation that included the 1988 amendment. See 1988 U.S. Code Cong. & Admin. News 5937. Nor does there appear to have been floor debate concerning the amendment to Section 1326. The sponsor of an earlier House bill (H.R. 3530, 100th Cong., 1st. Sess. (1987)) that contained language substantially similar to the language finally adopted stated that the proposed amendment "would impose stricter criminal penalties upon aliens who re-enter the United States after being deported. Existing law includes a penalty of up to 2 years in prison and/or a $2,000 fine for any deported alien who re-enters the United States. My bill adds two additional tiers of penalties." 133 Cong. Rec. 28,840-28,841 (1987) (remarks of Rep. Smith). The sponsor of an identical Senate bill (S. 973, 100th Cong., 1st. Sess. (1987)) made a similar introductory statement. 133 Cong. Rec. 8772 (1987) (remarks of Sen. Chiles).

Circuit in Cole held that the factors specified in Section 1326(b), like those in Section 841(b), could properly be taken into account at sentencing even though not specifically charged or proved at trial. 32 F.3d at 19.

The First Circuit has reached the same conclusion, although on different grounds. The court in United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994), held that the language and structure of Section 1326 are ambiguous, id. at 1298, but construed the statute in light of the longstanding practice that a defendant's prior felony convictions are generally background information to be considered by the judge at sentencing, rather than elements to be proved to the trier of fact. Id. at 1299 (citing Gov't of Virgin Islands v. Castillo, 550 F.2d 850, 853 n.5, 854 (3d Cir. 1977)); see also, e.g., United States v. Lowe, 860 F.2d 1370, 1377-1378 (7th Cir. 1988), cert. denied, 490 U.S. 1005 (1989). Moreover, the court noted that the existence of a prior conviction is usually not disputed, and could be prejudicial to the defendant if revealed to the jury. Forbes, 16 F.3d at 1299-1300. For these and similar reasons, the courts of appeals have generally concluded that prior convictions used to enhance sentences are not elements of the underlying crime. See United States v. Dunn, 946 F.2d 615, 619-620 (9th Cir.), cert. denied, 502 U.S. 950 (1991); United States v. Affleck, 861 F.2d 97 (5th Cir. 1988), cert. denied, 489 U.S. 1058 (1989); United States v. Kinsey, 843 F.2d 383, 390-392 (9th Cir.), cert. denied, 487 U.S. 1223 and 488 U.S. 836 (1988); United States v. Jackson, 891 F.2d

1151, 1152-1153 (5th Cir. 1989), cert. denied, 496 U.S. 939 (1990).

Because a prior felony conviction is not an element of the offense under Section 1326, petitioner errs in relying (Pet. 7) on the principle that the prosecution is required to prove every element of the crime beyond a reasonable doubt. See, e.g., In Re Winship, 397 U.S. 358, 364 (1970). Nor does McMillan v. Pennsylvania, 477 U.S. 79 (1986), aid petitioner's claim. McMillan makes clear that a legislature's definition of the elements of the offense is usually dispositive. 477 U.S. at 85. The Court accordingly held that a provision of Pennsylvania's Mandatory Minimum Sentencing Act, which provided a mandatory minimum sentence if the defendant visibly possessed a firearm during the commission of certain felonies, could constitutionally be treated as a sentencing consideration rather than as an element of a particular offense. The possibility that a sentencing enhancement factor may significantly increase the sentence does not compel the conclusion that the factor must be treated as an element of the offense. See United States v. Trujillo, 959 F.2d 1377, 1381 (7th Cir.) (quantity of drugs is a sentencing issue, not an element of 21 U.S.C. 841 offense), cert. denied, 506 U.S. 897 (1992). That is particularly true where the factor at issue is the easily verifiable existence of a prior conviction, which has traditionally been a matter taken into

consideration at sentencing.[6] See McMillan, 477 U.S. at 92-93 (citing with approval United States v. Davis, 710 F.2d 104, 106 (3d Cir.) (upholding constitutionality of substantial sentence enhancement under 18 U.S.C. 3575 for "dangerous special offenders" based in part on prior convictions), cert. denied, 464 F.2d 1001 (1983)); United States v. McGatha, 891 F.2d 1520, 1525-1527 (11th Cir.), cert. denied, 495 U.S. 938 (1990); United States v. Lowe, 860 F.2d at 1377-1381.

2. The court of appeals' holding accords with decisions of the First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits, as well as with a decision of the Fifth Circuit predating its decision in this case. See, e.g., Forbes, 16 F.3d at 1297-1300 (1st Cir.); Cole, 32 F.3d at 18 (2d Cir.); United States v. DeLeon-Rodriguez, 70 F.3d 764, 765-767 (3d Cir. 1995), cert. denied, 116 S. Ct. 1343 (1996); United States v. Crawford, 18 F.3d 1173, 1176-1178 (4th Cir.), cert. denied, 115 S. Ct. 171 (1994); United States v. Vasquez-Olvera, 999 F.2d 943, 944-947 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994); United States v. Munoz-Cerna, 47 F.3d 207, 210 n.6 (7th Cir. 1995); United States v. Haggerty, 85 F.3d 403, 404-405 (8th Cir. 1996); United States v. Valdez, 1996 WL 742321 (10th Cir., Dec. 31, 1996); United States v. Palacios-Casquete, 55 F.3d 557, 559-560 (11th Cir. 1995), cert. denied, 116 S. Ct. 927 (1996).

[6] Indeed, although his prior burglary convictions were not included in the indictment as an element of the offense, petitioner admitted as part of the factual basis for his guilty plea that he had in fact been convicted of the three burglary offenses that were the basis for enhancement of his sentence pursuant to Section 1326(b)(2). Gov't C.A. Br. 4; Pet. 3. Accordingly, there was no disputed issue of fact relating to those prior offenses.

As petitioner points out (Pet. 6), the Ninth Circuit has adopted the interpretation of Section 1326 that he advances in this case. See, e.g., United States v. Campos-Martinez, 976 F.2d 589, 590-592 (9th Cir. 1992). The conflict, however, is of limited legal or practical importance. Because proof of prior convictions is normally quite simple and not subject to dispute, the requirement in the Ninth Circuit that the government allege such convictions in an indictment or information and prove them at trial, rather than at sentencing, has not contributed significantly to the difficulty of trying cases under Section 1326(b) in that circuit, and is unlikely to do so in the future. Nor, providing that prosecutors comply with that circuit's requirement of alleging such convictions and proving them at trial, is that requirement likely to have any effect on the outcome of cases brought in the Ninth Circuit as compared with cases in other circuits. Accordingly, the conflict among the courts of appeals on the question presented in this case does not merit resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MARK M RICHARD
Acting Assistant Attorney General

WILLIAM C. BROWN
Attorney

FEBRUARY 1997

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ALMENDAREZ-TORRES, HUGO ROMAN Petitioner	)	
vs.	)	No. 96-6839
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 20th day of February 1997.

PETER FLEURY
ASST. FEDERAL PUBLIC DEFENDER
600 TEXAS STREET
SUITE 100
FORT WORTH, TX 76102-4612

Walter Dellinger/as
WALTER DELLINGER
Acting Solicitor General

February 20, 1997

No. 96-6839

In The

Supreme Court of the United States

October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

PETER FLEURY*
TIMOTHY CROOKS
Assistant Federal
Public Defenders
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
(817) 978-2753
Counsel for Petitioner

WALTER DELLINGER*
Acting Solicitor General
Department of Justice
Washington, DC 20530-0001
(202) 514-2217
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed November 20, 1996
Certiorari Granted March 31, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

34 pp

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

• • •

9/12/95	INDICTMENT as to Hugo Roman Almendarez-Torres
10/27/95	Minute entry as to Hugo Roman Almendarez-Torres: ARRAIGNMENT; Held before Judge John McBryde Court Reporter: Eileen Brewer; AUSA Gartner and Fleury present; Defense waived reading of Indictment; Dft enters plea of not guilty; Trial set for 12.18.95 at 8:30am; Pretrial motions due 11.13.95; Discovery motions/Govt responses due 11.20.95; DFt remanded to custody.
12/1/95	Minute entry as to Hugo Roman Almendarez-Torres: REARRAIGNMENT; Held before Judge John McBryde Court Reporter: Eileen Brewer; AUSA Bradford and FPD Fleury present; Held on count 1; deft enters plea of GUILTY; factual resume filed; sentencing set 3-1-96 at 9am; psi due 1-8-96; deft remanded to custody.
3/1/96	Minute entry as to Hugo Roman Almendarez-Torres: SENTENCING; Held before Judge John McBryde Court Reporter: Susan Griggs-Merit Court Reporters; AUSA Bradford and FPD Fleury present; deft committed to BOP 85 months; placed on supervised release 2 yrs; MSA $50 on ct 1; deft advised of his right to appeal; deft remanded to custody.
3/4/96	NOTICE OF APPEAL by Hugo Roman Almendarez-Torres (1) count 1 – from judgment of conviction and sentence; no fee paid; FPD atty; copies dist to judge, usaty, atty, prob/prtrial, usm

3/6/96 JUDGMENT Hugo Roman Almendarez-Torres (1) count(s) 1. Pled guilty-Committed to BOP 85 months; MSA $50.00; No fine imposed; Supervised Release 2yrs; Dft remanded to custody of USM. (Signed by Judge John McBryde)

9/20/96 JUDGMENT OF USCA (certified copy) as to Hugo Roman Almendarez-Torres Re: [18-1] appeal affirming judgment/order Hugo Roman Almendarez-Torres (1) count(s) 1 (1) ctj. . . . judgment of the district court is affirmed

9/20/96 OPINION OF USCA (certified copy) in accordance with USCA judgment re: [26-1] appeal . . . judgment of the district court is affirmed (2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES

v.

HUGO ROMAN

ALMENDAREZ-TORRES

Crim. No.
4:95-CR-124A

(Filed September 12, 1995)

The Grand Jury charges;

That on or about July 28, 1995, in the Fort Worth Division of the Northern District of Texas, HUGO ROMAN ALMENDAREZ-TORRES, defendant, an alien, who had been previously arrested and deported from the United States on or about April 18, 1992, knowingly and unlawfully was found in the United States, that is, he did not, prior to his re-entry into the United States after being deported, obtain permission and consent of the Attorney General to re-enter the United States.

A violation of Title 8, United States Code, Section 1326.

A TRUE BILL.

/s/ Charles Gillaspie
FOREMAN

PAUL E. COGGINS
UNITED STATES ATTORNEY

/s/ John P. Bradford
JOHN P. BRADFORD

Assistant United States Attorney
State Bar No. 02818300
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Telephone: 817-334-3291

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(TITLE OMITTED IN PRINTING)

FACTUAL RESUME

INDICTMENT: *One Count* – Illegal Re-Entry After Deportation, in violation of Title 8, United States Code, Section 1326.

PENALTY: $250,000 fine – 10 years imprisonment, or both, plus a term of supervised release of up to 3 years.

MAXIMUM PENALTY: $250,000 fine and 10 years imprisonment, plus a term of supervised release of 3 years. Further, if the terms of supervised release are violated, the defendant can be imprisoned for the term of supervised release. In addition, the Court must impose a **MANDATORY SPECIAL ASSESSMENT: $50.00.**

ELEMENTS OF THE OFFENSE: To establish the guilt of the defendant for the offense alleged in the Indictment, the government must prove the following elements beyond a reasonable doubt:

1. That on or about the date alleged in the Indictment the defendant was an

alien unlawfully found in the United States;

1. That the defendant has been previously arrested and deported from the United States; and

3. That prior to defendant's re-entry into the United States he did not obtain permission and consent from the Attorney General to re-enter the United States.

FACTS: HUGO ROMAN ALMENDAREZ-TORRES is a national of Mexico, having been born in Villa Hidalgo, San Luis Potosi, Mexico on August 9, 1971.

On March 11, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offense of Burglary of a Habitation in Cause Number 0432394D. On July 26, 1991 the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas for the offenses of Burglary of a Habitation in Cause Numbers 0444757A and 0437963A. On March 14, 1991 the defendant was convicted in a Criminal District Court of Dallas County, Texas for the offense of Burglary of a Habitation in Case Number F-91-29541-UH.

The defendant, on April 18, 1992 was deported from the United States to Mexico at Brownsville, Texas pursuant to his convictions.

In June 1992 the defendant illegally entered the United States by crossing

the Rio Grande River near Laredo, Texas and evading inspection by a United States Immigration Officer. On July 28, 1995 the defendant, HUGO ROMAN ALMENDAREZ-TORRES was found by an agent of the United States Border Patrol to be incarcerated in the Tarrant County jail. Investigation revealed that in June 1992 the defendant had illegally entered the United States by crossing the Rio Grande River near Laredo, Texas and evading inspection by a United States Immigration Officer.

Investigation further revealed that there was no record on file with the INS Central Office, Records Management Branch, Operations Section, Certification Unit, in Washington, D.C. that the defendant had applied for or received permission to re-enter the United States after deportation.

SIGNED AND AGREED TO THIS 29th day of November, 1995.

/s/ Hugo R. Almendarez
HUGO ROMAN ALMENDAREZ-TORRES
Defendant

/s/ John P. Bradford
JOHN P. BRADFORD
Assistant United States Attorney

/s/ Peter Fleury
PETER FLEURY
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(TITLE OMITTED IN PRINTING)

(EXCERPTS FROM GUILTY PLEA
HEARING TRANSCRIPT)
(pp. 6, 10-17)

* * *

[6] The Court is not bound by facts that are stipulated between you, on the one hand, and the government, on the other. The Court can impose punishment that might disregard stipulated facts or take into account facts not mentioned in the stipulated facts. You might not be permitted to withdraw your plea of guilty in such an event.

* * *

[10] THE COURT: Now I think we may have reviewed this before. You have received a copy of the indictment in this case?

THE DEFENDANT: Yes, sir.

THE COURT: And you've read it and understood it?

[11] THE DEFENDANT: Yes, sir.

THE COURT: And discussed it with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: You know exactly what you're being charged with?

THE DEFENDANT: Yes, sir.

THE COURT: Illegal reentry after deportation?

THE DEFENDANT: Yes, sir.

THE COURT: In violation of Title 8, United States Code, Section 1326?

THE DEFENDANT: Yes, sir.

THE COURT: Unless there's a waiver of the reading of the indictment, I'm going to ask that it be read at this time.

MR. FLEURY: We will waive the reading of the indictment, Your Honor.

THE COURT: Okay. Now I have with me a document that has been handed up this morning called factual resume. I'm going to hold it up so you can see what I'm talking about. Do you see that?

THE DEFENDANT: Yes, sir.

THE COURT: It appears to bear your signature. Did you sign that?

THE DEFENDANT: Yes, sir.

THE COURT: It looks like you may have signed it the day before yesterday?

[12] THE DEFENDANT: Wednesday, yes, sir.

THE COURT: And did you read it before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you discuss it with Mr. Fleury before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Well, you understand the next thing I'm going to go over with you because it's in this document. But it's important so I'm going to review it with you again.

If you were to persist in a plea of not guilty to the one-count indictment, for you to be convicted of the offense charged by that count, the government would have to prove to a jury beyond a reasonable doubt each of the following elements:

First, that on or about the date alleged in the indictment you were an alien unlawfully found in the United States.

Second, that you had previously been arrested and deported from the United States.

And, third, that prior to your reentry into the United States you did not obtain permission and consent from the Attorney General to reenter the United States.

Now do you understand that?

THE DEFENDANT: Yes, sir.

[13] THE COURT: And do you understand that if each and every one of those elements could not be proved to a jury beyond a reasonable doubt, that you

would be acquitted and found not guilty of the offense charged by the indictment if you were to persist in your plea of not guilty. Do you understand that?

THE DEFENDANT: Yes, I understand that.

THE COURT: Do you admit that each and every one of those elements exist in this case?

THE DEFENDANT: Yes, sir.

* * *

[14] THE COURT: No one said you're going to get any benefit by pleading guilty or get any special deal by pleading guilty?

THE DEFENDANT: No, sir.

THE COURT: No one has made any kind of a promise or assurance to you of any kind; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone mentally, physically, or in any other way attempted to force you to plead guilty in this case?

THE DEFENDANT: No, sir.

THE COURT: Do you understand that if you plead guilty and if your guilty plea is accepted, you will be adjudged guilty of the offense charged by the one-count indictment in this case, and that your punishment will assessed somewhere within the range of punishment provided by statute and your sentence will be within the range provided by statute.

THE DEFENDANT: Yes, sir.

THE COURT: Now the penalty you're subjecting yourself to by a plea of guilty is set forth in this factual resume that you signed so you fully understand that. But I'm going to go over that again. It's important.

If you plead guilty you're subjecting yourself to the [15] following penalties and punishments: A fine of $250,000; plus, a term of imprisonment of ten years; plus, a term of supervised release of three years. Now that supervised release will be subject to conditions that I'll set at the time of sentencing. If you were to violate any of those conditions, your supervised release could be revoked and you could be required to serve further imprisonment, and that additional imprisonment could be up to the full term of the supervised release.

In addition, you could be required – or you would be required to pay a special assessment of $50 at the time of sentencing. Do you understand that you're subjecting yourself to all those penalties and punishments by a plea of guilty to the count in the one-count indictment?

THE DEFENDANT: Yes, sir.

* * *

[16] THE COURT: Okay. I'll accept the plea of guilty on condition that there's a factual basis to support it, and I'll ask that the facts section of the factual resume be read into the record.

MR. BRADFORD: If it please the Court. Hugo Roman Almendarez-Torres is a national of Mexico having been born in Villa Hidalgo, San Luis Potosi, Mexico on August 9, 1971.

On March 11, 1991, the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas, for the offense of burglary of a habitation in Cause No. 0432394D. On July 26th, 1991, the defendant was convicted in Criminal District Court Number Two of Tarrant County, Texas, for the [17] offenses of burglary of a habitation in Cause Nos. 0444757A and 0437963A. On March 14, 1991, the defendant was convicted in Criminal District Court of Dallas County, Texas, for the offense of burglary of a habitation in Cause No. F-91-29541-UH.

The defendant on April 18, 1992, was deported from the United States to Mexico at Brownsville, Texas, pursuant to his convictions.

In June 1992 the defendant illegally entered the United States by crossing the Rio Grande River near Laredo, Texas, and evading inspection by a United States Immigration Officer. On July 28, 1995, the defendant, Hugo Roman Almendarez-Torres, was found by an agent of the United States Border Patrol to be incarcerated in the Tarrant County jail. Investigation revealed that in June 1992 the defendant illegally entered the United States by crossing the Rio Grande River near Laredo, Texas, and evading inspection by a United States Immigration Officer.

Investigation further revealed that there was no record on file with the INS Central Office, Records Management Branch, Operations Section, Certification Unit, in Washington, D.C. that the defendant applied for or received permission to reenter the United States after deportation.

THE COURT: Okay. You've heard the facts section of the factual resume read. Are all those facts true and correct?

THE DEFENDANT: Yes, sir.

* * *

---

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(TITLE OMITTED IN PRINTING)

(EXCERPTS FROM SENTENCING
HEARING TRANSCRIPT)
(pp. 1-4, 7)

* * *

[2] THE COURT: Okay. The next matter is United States of America versus Hugo Roman Almendarez-Torrez.

Mr. Bradford is here for United States of America; Mr. Fleury is here for the defendant. Does this defendant need an interpreter, Mr. Fleury?

MR. FLEURY: No, Your Honor.

THE COURT: Do you commonly go by the surname "Almendarez"?

MR. ALMENDAREZ: Yes, sir.

THE COURT: Okay. You appeared before me on December 1, 1995, at which time you entered a plea of guilty to the charge of illegal re-entry after deportation. That charge was made against you on a one-count indictment.

There was no plea agreement pursuant to which you entered the plea, and we're here today for sentencing of you based on your conviction pursuant to that plea of guilty.

Mr. Fleury, did you and your client receive in a timely manner the presentence investigation report and the addendum to it?

MR. FLEURY: We did, Your Honor.

THE COURT: Did both of you read it and [3] discuss it with each other?

MR. FLEURY: Yes, Your Honor.

THE COURT: Okay. The only objection made by the defendant – let's see the government made an objection.

Let's see, the government objected to Paragraph 52 of the report and the probation officer accepted that objection.

I take it you're satisfied with that, Mr. Bradford?

MR. BRADFORD: Yes, Your Honor. A clarification on the government's part, an agreement causing an increase in the statutory sentence and the government failed to catch it and the probation department made a change.

THE COURT: Okay. And then the defendant's objection is to Paragraphs 52 and 53 raising an issue that has been resolved against the defendant by the Fifth Circuit but apparently has gone in favor of defendants by other circuits. Is that basically true?

MR. FLEURY: That's correct, Your Honor.

THE COURT: And you are just making it for the record. I assume you don't expect me to –

MR. FLEURY: I understand.

[4] THE COURT: – not follow the Fifth Circuit law?

MR. FLEURY: I understand.

THE COURT: Okay. And so I'll overrule that objection. Is that your only objection?

MR. FLEURY: That is, Your Honor.

THE COURT: Okay. I'll overrule that objection.

There being no further objections to the presentence investigation report, the Court adopts as the fact finding report, the facts set forth in the presentence investigation report and adopts as modified or supplemented by the addendum and adopts the conclusions of the Court, the conclusions set forth in the presentence investigation report as modified and supplemented by the addendum.

The Court concludes that the total offense level is 21, that the criminal history category is six, that the imprisonment range is 77 months to 96 months, but with a supervised release of two to three years, that the fine range is $7,500 to $75,000 and that a special assessment of $50 is mandatory.

* * *

[7] The Court orders and adjudges that the defendant be committed to the custody of the Bureau of Prisons to serve a term of imprisonment of 85 months. The Court further orders and adjudges that the defendant, upon discharge from prison, be placed on supervised release and serve a term of supervised release of two years.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10254
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO ROMAN ALMENDAREZ-TORRES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:95-CR-124-A

[FILED IN THE U.S. COURT OF APPEALS-
AUGUST 22, 1996]

Before KING, DUHÉ, and DeMOSS, Circuit Judges.

PER CURIAM:*

Hugo Roman Almendarez-Torres appeals his judgment of conviction and sentence after pleading guilty to reentry after deportation in violation of 8 U.S.C. § 1326. He argues that he was charged with and pleaded guilty to § 1326(a), simple reentry, but that he was sentenced as if

---

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

he had pleaded guilty to reentry following a conviction for an aggravated felony for purposes of § 1326(b)(2). His argument is foreclosed by this court's opinion in *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1994).

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10254
Conference Calendar

D.C. Docket No. 4:95-CR-124-A

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

HUGHO [sic] ROMAN ALMENDAREZ-TORRES

Defendant - Appellant

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

[FILED IN THE U.S. COURT OF APPEALS-AUGUST 22, 1996]

[FILED IN THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF TEXAS-SEPTEMBER 20, 1996]

(JURAT OMITTED IN PRINTING)

Before KING, DUHE', and DeMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

ISSUED AS MANDATE: SEP 16 1996

SUPREME COURT OF THE UNITED STATES

No. 96-6839

Hugo Roman Almendarez-Torres

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appelas [sic] for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 31, 1997

---

(5)

No. 96-6839

In The

Supreme Court of the United States

October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

PETER FLEURY*
TIMOTHY CROOKS
Assistant Federal Public Defenders
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
(817) 978-2753
Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

81pp

QUESTIONS PRESENTED

1. Whether Title 8, Section 1326(b), United States Code, defines offenses separate from the offense defined in Section 1326(a), so that an alien defendant's previous conviction or convictions must be alleged in the indictment and proved at trial beyond a reasonable doubt before an enhanced sentence may be imposed?

2. Whether a sentencing court violates due process by determining that Title 8, Section 1326(b)(2) is not a separate offense from Title 8, Section 1326(a), but rather merely a sentencing enhancement of that offense?

LIST OF PARTIES

1. United States of America
2. Hugo Roman Almendarez-Torres

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the court of appeals (J.A. 18) was originally unpublished, although the judgment was noted at 96 F.3d 1443 (Table). The opinion has since been designated for publication and is to be reported at 113 F.3d 515, 1996 WL 887502. The judgment of the district court is not reported.

JURISDICTION

The decision of the court of appeals (J.A. 18) was announced on August 22, 1996. The petition for certiorari was filed on November 20, 1996. Certiorari was granted on March 31, 1997. (J.A. 22) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an impartial jury, . . . , and to be informed of the nature and the cause of the accusation; . . . " U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

The full text of the version of Section 1326 of Title 8, United States Code, which was in effect on the date Petitioner's offense was alleged to have occurred is set out in Appendix A to this Brief. The various sets of amendments to Section 1326 are set out in Appendix B to this brief, beginning at page B-1.[1]

STATEMENT

On September 12, 1995, the Petitioner, Hugo Roman Almendarez-Torres, was charged in a single count indictment with illegal reentry into the United States in violation of Title 8, United States Code, Section 1326.[2] (J.A. 3) On December 1, 1995, Petitioner entered a plea of guilty to the indictment. (J.A. 1)

[1] With respect to these amendments, in each case deleted text is lined through, and added text is indicated in boldface type.

[2] Particularly, Petitioner was charged with being found in the United States on or about July 28, 1995, having reentered the United States illegally (without the permission of the Attorney General) at some time prior to that date, but subsequently to his deportation on or about April 18, 1992. (J.A. 3)

Prior to sentencing, the Probation Office prepared a presentence investigation report, which stated that the maximum sentence for the offense to which Petitioner had pleaded was 15 years imprisonment. Petitioner filed written objections to the presentence investigation report, urging that the offense to which he had pleaded guilty was merely a "simple" illegal reentry after deportation, as proscribed by Title 8, United States Code, Section 1326(a) – which carried a maximum penalty of only two years imprisonment. At sentencing on March 1, 1996, the district court overruled Petitioner's objections, and proceeded to sentence Petitioner to, among other things, 85 months imprisonment in the custody of the Bureau of Prisons. (J.A. 17)

The Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit. On August 22, 1996, that court entered its opinion affirming the judgment of conviction and sentence, relying on that court's previous decision in *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1994). (J.A. 18-19)

This Court granted certiorari on March 31, 1997. (J.A. 22)

SUMMARY OF ARGUMENT

I.

Analysis of the language, structure, and legislative history of § 1326 compels the conclusion that, in § 1326(b)(1) and (b)(2), Congress intended to create new

offenses, separate and distinct from the offense described in § 1326(a), rather than sentencing enhancements of the § 1326(a) offense.

A. In deciding this question, the lower federal courts have principally utilized two somewhat different approaches. The first of these is that used by the Fifth Circuit in the precedent governing that court's decision in this case: namely, an analysis of the language and structure of § 1326 in light of four factors extracted from this Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985). The second approach is a broader-based analysis of the language, structure, and legislative history of § 1326. Under either of these approaches, this Court should find that Congress intended that § 1326(b)(1) and (2) were to be new, independent offenses, rather than just sentencing enhancements of the offense set out in § 1326(a).

B. The language and structure of § 1326 – particularly when viewed in light of the statutory evolution of that provision – demonstrate Congress's intent to make § 1326(b)(1) and (b)(2) separate offenses. When Congress added (b)(1) and (2) in 1988, it put them in a separate subsection from the offense described in (a), and declined to label this subsection "Penalties," as it has so often done in other statutes. In 1990, Congress made the language of §§ 1326(a), (b)(1), and (b)(2) parallel, indicating its intent to require parallel treatment of these three provisions, i.e., each as a separate offense.

In 1996, Congress made even clearer its intent that (b)(1) and (b)(2) were separate offenses, and not just sentencing enhancements, when it amended § 1326 by

adding subsections (b)(3) and (b)(4), which are clearly separate offenses. In new subsection 1326(d), Congress also evidenced its intent that the elements of subsection (a) were implicitly incorporated into subsections (b)(1) and (b)(2). Finally, in related legislation directed to the Sentencing Commission, Congress explicitly referred to § 1326(b)(1) and (2) as "offenses."

Because subsequent legislation declaring the intent of Congress with respect to the earlier statute is entitled to great weight in statutory construction, the history of the amendments to § 1326 makes it plain that, in § 1326(b)(1) and (2), Congress intended to create new offenses, not just sentencing enhancements.

C. The same result follows from an analysis of the language and structure of § 1326 in light of the factors identified by this Court in *Garrett*. First, § 1326(b)(1) and (2) do not predicate punishment under those sections on a "conviction" or "violation" of § 1326(a). Rather, these provisions apply "[i]n the case of [an] alien described in [subsection (a)]," which could just as well, or better, be read to simply incorporate by reference all of the elements of (a) into (b)(1) and (2). Second, § 1326(b)(1) and (b)(2) do not "multiply" the penalty received under (a); rather, each of these carries its own discrete penalty, which makes no reference to the penalty in (a).

Nor does the statute in question here provide guidelines for the sentencing hearing – another feature identified by the *Garrett* Court as indicative of a sentencing enhancement rather than a separate offense. Finally, the title of § 1326 sheds no light on the question at issue, since it is at best ambiguous. Accordingly, under the four-

factor *Garrett* analysis used by the court below, § 1326(b)(1) and (2) are best understood as creating independent offenses, rather than just sentencing enhancements of the offense set out in § 1326(a).

D. To the extent that legislative history may be consulted to divine Congressional intent with respect to this question, the available legislative history in this case is unhelpful and therefore does not alter the conclusion reached above that Congress intended for § 1326(b)(1) and (b)(2) to comprise separate offenses.

E. Even if the Petitioner's reading of the statute is not deemed to be compelled by the language and structure of the statute, that reading is nonetheless compelled by the rule of lenity, since the text, structure, and legislative history fail to establish that the government's position is unambiguously correct.

F. Finally, this Court's analysis should be informed by the venerable principle that, where two constructions of a statute are possible, the Court has the duty to select the construction which avoids grave and doubtful constitutional questions. Because the construction given by the Fifth Circuit in this case raises such questions, this Court should avoid the constitutional questions by ruling in Petitioner's favor as a matter of statutory construction.

II.

The Fifth Circuit's construction of § 1326 in this case – namely, that § 1326(b)(1) and (b)(2) are only sentencing enhancements, not separate offenses – violates the constitutional rights to (1) grand jury indictment in a federal

case, proof beyond a reasonable doubt, and due process under the Fifth Amendment to the Constitution, and (2) trial by jury and notice of the nature of the charges under the Sixth Amendment.

A. The determinative fact of a prior felony conviction or prior aggravated felony conviction, under § 1326(b)(1) and (2) respectively, requires punishment of up to 10 or 20 years imprisonment respectively – that is, either five or ten times the maximum term of imprisonment authorized in the absence of proof of this fact. Because the determinative fact of a prior felony or aggravated felony conviction results in a drastically greater statutory maximum sentence, the Constitution requires that such fact must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

B. A crime has always been understood to be composed of two parts: the facts which comprise the prohibited conduct and the punishment therefor. Thus, whether labeled as "elements" or not, each of the facts that would justify the punishment must be alleged in the indictment and proved beyond a reasonable doubt, to satisfy the defendant's right to a grand jury indictment for, and proof beyond a reasonable doubt of, a "crime," and his right to a jury trial in a "criminal prosecution."

The punishment attached to the proscribed conduct has always determined the amount of process due before a person may be subjected to that punishment. Here, the drastically increased level of punishment caused by proof of the fact of a prior felony or aggravated felony under § 1326(b)(1) or (2) requires the highest degree of due process available, to-wit: proof beyond a reasonable

doubt and the rest of the panoply of rights attendant upon proof of a criminal offense.

C. At common law, as reflected in numerous decisions of this Court and lower federal and state courts, the nearly universal historical practice was that, where prior convictions raised the statutory maximum punishment – as is the case here – those convictions had to be alleged in a charging instrument, and proved to a jury beyond a reasonable doubt. This historical tradition from the common law informs this Court's interpretation of the Constitution, and requires that the Court hold this practice to be compelled by the Constitution.

D. In fact, this Court's decisions establish that when the legislature has determined that the existence of a fact will raise the maximum punishment, that fact must be alleged in the indictment and proved beyond a reasonable doubt to a jury. Moreover, in order to prevent the erosion of the fundamental protections at issue, including, notice, grand jury indictment, proof beyond a reasonable doubt, and jury trial, this Court should exercise its supervisory powers in this case. The Court's supervisory powers must be guided by the common law, state and federal authority, and considerations of justice, which compel the conclusion that the aggravated felony referred to in 8 U.S.C. § 1326(b)(2) must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

The Court should therefore hold that a defendant may not be punished under § 1326(b)(1) or (2) unless the prior felony or aggravated felony is alleged in an indictment, and proved beyond a reasonable doubt.

ARGUMENT

I. AS A MATTER OF STATUTORY CONSTRUCTION, 8 U.S.C. § 1326(b)(1) AND (b)(2) MUST BE READ AS CREATING SEPARATE AND DISTINCT OFFENSES FROM THE OFFENSE DESCRIBED IN 8 U.S.C. § 1326(a), RATHER THAN SENTENCING ENHANCEMENTS OF THE OFFENSE DESCRIBED IN § 1326(a).

A. Introduction.

In the present case, Petitioner argued below "that he was charged with and pleaded guilty to [8 U.S.C.] § 1326(a), simple reentry [after deportation], but that he was sentenced as if he had pleaded guilty to reentry following a conviction for an aggravated felony for purposes of § 1326(b)(2)." *United States v. Almendarez-Torres*, No. 96-10254, slip op. at 1 (5th Cir. Aug. 22, 1996). (J.A. 18-19) However, the Fifth Circuit rejected Petitioner's claim on the basis of its prior decision in *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1994). *Almendarez-Torres*, *id.* at 1-2. (J.A. 18-19)

In *Vasquez-Olvera*, a divided panel of the Fifth Circuit held that 8 U.S.C. § 1326(b)(2) did not create a separate criminal offense, but rather was only a sentencing enhancement of the offense described in § 1326(a). *Vasquez-Olvera*, 999 F.2d at 945-47. Judge King dissented. Judge King found that neither the language and structure of § 1326(b), nor the legislative history surrounding the enactment of that provision, clearly demonstrated Congress's intent with respect to this question. *Id.* at 947-49 (King, J., dissenting). Judge King then concluded that, in

light of this ambiguity, it was appropriate to apply the rule of lenity and to hold that § 1326(b)(2) created a separate criminal offense, rather than just a sentencing enhancement. *Id.* at 949-50 (King, J., dissenting).

The majority of courts have agreed with the majority opinion in *Vasquez-Olvera*, holding that § 1326(b)(1) and (2) are not separate criminal offenses and that, therefore, the "felony" and "aggravated felony" components of § 1326(b)(1) and (b)(2) respectively need not be alleged in the indictment, nor proved beyond a reasonable doubt.[3] The Ninth Circuit, however, has squarely held that § 1326(b)(1) and (b)(2) create separate criminal offenses from that described in § 1326(a), and that the "felony" and "aggravated felony" components of the former provisions are elements which must be pleaded in the indictment and proved beyond a reasonable doubt before a defendant may be sentenced under those provisions.[4]

---

[3] *See United States v. Valdez*, 103 F.3d 95, 97-98 (10th Cir. 1996); *United States v. Haggerty*, 85 F.3d 403, 405-06 (8th Cir. 1996); *United States v. DeLeon-Rodriguez*, 70 F.3d 764, 766-67 (3rd Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1343 (1996); *United States v. Palacios-Casquete*, 55 F.3d 557, 560 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 927 (1996); *United States v. Cole*, 32 F.3d 16, 18-19 (2nd Cir.), *cert. denied*, 513 U.S. 993 (1994); *United States v. Crawford*, 18 F.3d 1173, 1178-79 (4th Cir.), *cert. denied*, 513 U.S. 860 (1994); *United States v. Forbes*, 16 F.3d 1294, 1300 (1st Cir. 1994); *see also United States v. Muñoz-Cerna*, 47 F.3d 207, 210 n.6 (7th Cir. 1995) (dicta).

[4] *See United States v. Campos-Martinez*, 976 F.2d 589, 591-592 (9th Cir. 1992); *United States v. Gonzalez-Medina*, 976 F.2d 570, 572-73 (9th Cir. 1992); *United States v. Arias-Granados*, 941 F.2d 996, 998 (9th Cir. 1991) ("A prior felony conviction is an element of . . . 8 U.S.C. § 1326. . . . ") (dicta). *Accord Vasquez-Olvera*, 999 F.2d at 947 & 949-50 (King, J., dissenting); *United States v. Vieira-Candelario*, 811 F.Supp. 762, 768 (D.R.I. 1993), *overruled in relevant part by United States v. Forbes*, 16 F.3d 1294, 1300 (1st Cir. 1994).

The courts have differed more widely in the appropriate mode of analysis to use in deciding this question. The Fifth Circuit in *Vasquez-Olvera*, relying on its prior decision in *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986), analyzed the language and structure of § 1326 by looking to a number of factors first articulated in this Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985).[5] *See Vasquez-Olvera*, 999 F.2d at 945-46; *see also id.*

---

[5] In *Davis*, the Fifth Circuit applied a number of factors drawn from this Court's decision in *Garrett* to decide a question similar to that presented by this case: i.e., whether the former version of the Armed Career Criminal Act (hereafter "former ACCA") – located at former 18 U.S.C. App. § 1202(a) – created a separate criminal offense from the offense of being a felon in possession of a firearm (which latter offense was set out in the sentence preceding the former ACCA), or whether the former ACCA was merely a sentencing enhancement of the offense contained in the preceding sentence. The circuits were divided on this question as well. *Compare United States v. Rumney*, 867 F.2d 714, 718-19 (1st Cir.) (sentencing enhancement), *cert. denied*, 491 U.S. 908 (1989); *United States v. Dickerson*, 857 F.2d 414, 417 (7th Cir. 1988), *cert. denied*, 490 U.S. 1023 (1989); *United States v. Brewer*, 853 F.2d 1319, 1322-27 (6th Cir.) (same), *cert. denied*, 488 U.S. 946 (1988); *United States v. Rush*, 840 F.2d 574, 577-78 (8th Cir.) (*en banc*) (same), *cert. denied*, 487 U.S. 1238 (1988) *and cert. denied*, 487 U.S. 1239 (1988); *United States v. Blannon*, 836 F.2d 843, 844-45 (4th Cir.) (same), *cert. denied*, 486 U.S. 1010 (1988); *United States v. West*, 826 F.2d 909, 911-12 (9th Cir. 1987) (same); *United States v. Jackson*, 824 F.2d 21, 25-26 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (same), *cert. denied*, 484 U.S. 1013 (1988); *United States v. Hawkins*, 811 F.2d 210, 220 (3rd Cir.) (same), *cert. denied*, 484 U.S. 833 (1987); *and United States v. Gregg*, 803 F.2d 568, 570 (10th Cir. 1986), *cert. denied*, 480 U.S. 920 (1987) *with*

at 947-49 (King, J., dissenting) (also applying *Garrett/Davis* factors). Other courts have supplemented the *Garrett/Davis* analysis with (or eschewed it in favor of) a broader-based analysis of the language, structure, and legislative history of § 1326. *See, e.g., Forbes*, 16 F.3d at 1298 (noting that *Garrett* factors may be helpful, but are not conclusive; *citing Rumney*, 867 F.2d at 718-19). The Ninth Circuit has taken a different tack and has interpreted § 1326 in light of its case law construing 8 U.S.C. § 1325, the statute forbidding illegal entry into the United States. *See Campos-Martinez*, 976 F.2d at 591-92.

In the present case, analysis of the language and structure of § 1326 – including how § 1326 has evolved statutorily – compels the conclusion that § 1326(b)(1) and (b)(2) create new offenses, separate and distinct from the offense described in § 1326(a), rather than sentencing enhancements. This conclusion is bolstered by particular application of the *Garrett* factors to the statutes at issue. Accordingly, the Fifth Circuit erred in holding that § 1326(b)(1) and (b)(2) are merely sentencing enhancements of the offense described in § 1326(a).

Davis, 801 F.2d at 755-56 (5th Cir. 1986) (separate criminal offense). *See also United States v. Brewer*, 841 F.2d 667, 668-69 (6th Cir. 1988) (separate criminal offense), *rev'd in relevant part on panel reh'g*, 853 F.2d 1319, 1322-27 (6th Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *Brewer*, 853 F.2d at 1327-29 (Merritt, J., dissenting) (separate criminal offense); *Rush*, 840 F.2d 574, 578-80 (Gibson, J., dissenting) (same); *Hawkins*, 811 F.2d at 223-25 (Rosenn, J., dissenting) (same).

B. The Language and Structure of 8 U.S.C. § 1326 – Particularly Viewed in Light of the Statutory Evolution of That Statute by Subsequent Congressional Amendments – Compel the Conclusion That Congress Intended That 8 U.S.C. § 1326(b)(1) and (b)(2) Be New, Separate Offenses, Rather Than Just Sentencing Enhancements of the Offense Described in § 1326(a).

In cases involving statutory interpretation, this Court looks "first to the language of the statute itself." *Hughey v. United States*, 495 U.S. 411, 415 (1990); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981). If the language of the statute does not plainly or unambiguously express the Congressional intent underlying the statute, however, this Court will attempt to divine the Congressional intent from an examination of "the language, structure, and legislative history" of the statute. *Garrett*, 471 U.S. at 779; *see also id.* at 778-85 (conducting such an analysis).

In this case, the language and the structure of § 1326 – particularly the 1988 amendments adding subsections (b)(1) and (b)(2), and subsequent amendments to § 1326 – demonstrate that Congress intended that subsections (b)(1) and (b)(2) were to be new, separate offenses, and not just enhancements of the sentence imposed for an offense under § 1326(a).

1. The 1988 Amendments

The statute at issue in this case – 8 U.S.C. § 1326 – was originally enacted by Congress in 1952.[6] Ch. 477, Title

---

[6] The 1952 version of 8 U.S.C. § 1326 is set out at Appendix B-1.

II, ch. 8, § 275, 66 Stat. 229 (June 27, 1952). So the statute remained for over 35 years, until 1988, when the statute was amended to add the particular provisions at issue in this case – § 1326(b)(1) and (b)(2).[7] Pub. L. 100-690, Title VII, § 7345(a), 102 Stat. 4471 (Nov. 18, 1988).

The language and the structure of the 1988 amendments adding subsections (b)(1) and (b)(2) demonstrate that Congress intended that subsections (b)(1) and (b)(2) were to be new, separate offenses, and not just enhancements of the sentence imposed for an offense under § 1326(a). First of all, it is significant that Congress placed the "felony" and "aggravated felony" provisions in their own subsection, with a different letter than that assigned to the original offense of "simple" illegal reentry found in subsection (a).[8] Moreover, "Congress could have easily

---

[7] The 1988 amendments are set out at Appendix B-2 through B-3 in the following format: additions to the predecessor version are indicated in bold, and deletions from the predecessor version are struck out. This format will be followed with respect to all of the discussed amendments of § 1326.

[8] *Compare United States v. Ryan*, 9 F.3d 660, 667 (8th Cir. 1993) (finding 18 U.S.C. § 844(i) to be sentencing enhancement, based on, *inter alia*, the fact that "lack of clear division into separate sections suggests treatment of contents as a single offense"), *aff'd on reh'g en banc*, 41 F.3d 361 (8th Cir. 1994) (*en banc*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1793 (1995); *Hawkins*, 811 F.2d at 218-19 (finding former ACCA to be sentencing enhancement based on, *inter alia*, the fact that "the inclusion of the [former ACCA] into the same paragraph as the previously enacted [felon-in possession] statutes, **with no division into separate numbers or letters, suggests treatment of the contents as a single offense**") (emphasis added); *Rumney*, 867 F.2d at 717-18 (same; citing *Hawkins*); *Brewer*, 853 F.2d at 1324 (same;

titled subsection (b) as a separate penalty provision, which it chose not to do; the failure to do so is noteworthy." *Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting). Indeed, Congress has frequently done just that, by titling one subsection of a statute the "offense," and another one the "penalty" or "punishment."[9]

In sum, the fashion in which Congress added § 1326(b)(1) and (b)(2) to § 1326 in 1988 indicates that Congress then intended to create new separate offenses, rather than just sentencing enhancements. This conclusion is further supported by the subsequent amendments to § 1326, as discussed below.

2. The 1990 Amendments

Only two years later, Congress amended § 1326 again.[10] Pub. L. 101-649, Title V, § 543(b)(3), 104 Stat. 5059 (Nov. 29, 1990). The 1990 amendments to § 1326 bolster the conclusion that Congress intended § 1326(b)(1) and (b)(2) to create new, separate offenses rather than just sentencing enhancements of the offense contained in § 1326(a). As this Court has noted, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to

---

also citing *Hawkins*); *West*, 826 F.2d at 911 (same; also citing *Hawkins*); *Jackson*, 824 F.2d at 23-24 (observing that *Hawkins* "observation ha[s] force").

[9] *See, e.g.*, 21 U.S.C. § 841 (subsection (a) entitled "Unlawful acts"; subsection (b) entitled "Penalties"); 18 U.S.C. § 1091 (subsection (a) entitled "Basic offense"; subsection (b) entitled "Punishment for basic offense").

[10] The 1990 amendments to § 1326 are set out at Appendix B-4 through B-5.

great weight in statutory construction." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 380-81 (1969) (footnote with citations omitted); *see also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of subsequent Congresses "entitled to significant weight"). This is "particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding*, 444 U.S. at 596.

The 1990 amendments made two changes confirming Congress's original intention to make (a), (b)(1), and (b)(2) each a separate offense. First, Congress amended subsection (a) so as to make its provisions respecting fine and imprisonment **parallel** with those in (b)(1) and (b)(2). This evidences Congress's intent that (a), (b)(1), and (b)(2) each be treated the same – i.e., as a separate offense. *Cf. Communications Workers of America v. Beck*, 487 U.S. 735, 752 (1988) ("Given the parallel purpose, structure, and language of [one provision], we must interpret that provision in the same manner [as its parallel]."); *Hillsboro Nat'l Bank v. CIR*, 460 U.S. 370, 402 (1983) (given Congressional acquiescence in judicial interpretation of 26 U.S.C. § 337, "we must conclude that Congress intended the same construction of the same language in the parallel provision in § 336.") This conclusion is bolstered by Congress's deletion, in the same amendment, of the language "shall be guilty of a felony," which language had theretofore been found only in (a), and not in (b)(1) or (2). Thus, by its amendments in 1990, Congress made even clearer its original intent that (b)(1) and (b)(2) were meant to describe separate offenses from the offense described in (a).

3. The 1994 and 1996 Amendments

Section 1326 was amended again in 1994.[11] Pub. L. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (Sept. 13, 1994). The principal thrust of these amendments was the increase of the maximum terms of imprisonment prescribed under § 1326(b)(1) and (b)(2), from 5 and 15 years, to 10 and 20 years, respectively. *See id.*

Finally, in 1996, § 1326 was amended twice. The first of these amendments was on April 24, 1996.[12] Pub. L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279 (Apr. 24, 1996). The second 1996 amendment was on September 30, 1996, and was to take effect on the first day of the first month beginning more than 180 days after enactment.[13] Pub. L. 104-208, Div. C, Title III, §§ 305(b)(1)-(3), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 309, 110 Stat. 3009 (Sept. 30, 1996).

The 1996 amendments provide additional support for the proposition that Congress intended for § 1326(b)(1) and (b)(2) to be separate offenses. First, in these amendments, Congress added subsections (b)(3) and (b)(4), which are clearly new offenses, separate from those in subsection (a). The addition of the new offenses in (b)(3) and (b)(4) demonstrates that Congress intended **all** of the divisions of subsection (b) to be separate offenses. It would make very little sense to have § 1326(b) comprised

---

[11] These amendments are set out at Appendix B-6 through B-7.

[12] These amendments are set out at Appendix B-8 through B-10.

[13] These amendments are set out at Appendix B-11 through B-13.

of four divisions, two of which were separate offenses, and two of which were only sentencing enhancements for an offense contained in another subsection. Congress's inclusion of the new offenses found in (b)(3) and (b)(4) indicates that it intended parallel treatment of (b)(1) and (b)(2) as separate offenses. *Cf. Communications Workers of America v. Beck*, 487 U.S. at 752; *Hillsboro Nat'l Bank v. CIR*, 460 U.S. at 402.

Furthermore, also in the 1996 amendments, Congress added § 1326(d) respecting collateral attacks of underlying deportation orders. This subsection places conditions on an alien's ability to "challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section. . . . " This is yet another indication that Congress intended for subsection (b)(1) and (b)(2) to be separate and distinct offenses from the one(s) described in (a): if subsection (b) merely contained enhancements of the sentence for the offense described in (a), why would Congress need to refer to both (a) **and** (b) in § 1326(d)?

Also significant is the fact that, unlike the text of subsection (a)(1), the text of subsection (b) does not contain the phrase "deportation order." Any "deportation order" "described in . . . subsection (b)," *see* 8 U.S.C. § 1326(d), is solely through implicit incorporation from subsection (a). Thus, subsection (d) is evidence that Congress intended to incorporate the elements of subsection (a) into subsection (b) – leading to the conclusion that (a) and (b) set out distinct offenses.

Finally, in a piece of related legislation, Congress (in perhaps the plainest expression of its intent) directed the

United States Sentencing Commission to "promptly promulgate, pursuant to section 994 of title 28, United States Code, amendments to the sentencing guidelines to make appropriate increases in the base offense level for **offenses under section 242(e) and 276(b) of the Immigration and Nationality Act (8 U.S.C. 1252(e) and 1326(b))** to reflect the amendments made by section 130001 of the Violent Crime Control and Law Enforcement Act of 1994." Pub. L. 104-208, 110 Stat. 3009, § 334 (Sept. 30, 1996) (emphasis added). By its selection of the term "offenses," Congress made it pellucidly clear that the provisions of § 1326(b) set out separate crimes, with their own elements, rather than sentencing enhancements of the offense contained in § 1326(a).[14] *See United States v. LaBonte*, ___ U.S. ___, 117 S.Ct. 1673, ___, 1997 WL 273644 *12 (May 27, 1997) (Breyer, J., dissenting) ("[T]he word 'offense' is a technical term in the criminal law, referring to a crime made up of statutorily defined elements.").

In sum, the language and structure of § 1326 – especially viewed in light of the history of Congress's amendments to that statute – instruct that Congress intended to create new, separate offenses in § 1326(b)(1) and (b)(2), not mere sentencing enhancements of the offense set out in subsection (a).

---

[14] Moreover, the reference is specifically to § 1326(b)(1) and (b)(2) since these were the provisions amended by the 1994 Act. Indeed, subsections (b)(3) and (b)(4) were not even added until 1996.

C. Analysis of the Language and Structure of 8 U.S.C. § 1326 in Light of the Factors Mentioned by This Court in *Garrett v. United States* Does Not Change the Conclusion Reached Above.

The conclusion reached above – i.e., that in § 1326(b)(1) and (b)(2) Congress intended to create new, separate offenses, rather than sentencing enhancements for the offense described in (a) – is not altered by use of the alternative analysis (used by the Fifth Circuit in *Vasquez-Olvera* and hence in this case) under the factors mentioned in this Court's opinion in *Garrett v. United States*. As articulated by the Fifth Circuit in *Vasquez-Olvera*, by way of citation to its prior opinion in *Davis*, *Garrett* sets out "four factors that are helpful in determining whether Congress intended a statutory provision to create an independent federal offense or a sentence-enhancement provision. Those factors are: (1) whether the statute predicates punishment upon conviction under another section, (2) whether the statute multiplies the penalty received under another section, (3) whether the statute provides guidelines for the sentencing hearing, and (4) whether the statute is titled as a sentencing provision." *Vasquez-Olvera*, 999 F.2d at 945, citing *Davis*, 801 F.2d at 756 (additional citation omitted). Each of these will be analyzed in turn.

1. Does the Statute Predicate Punishment upon Conviction under Another Section?

Rather than predicating punishment upon conviction under § 1326(a), it is just as likely, if not more so, "that

the drafters of the 1988 amendments to § 1326 could have intended simply to incorporate the three elements of § 1326(a) into § 1326(b) and simply add the additional element regarding a prior conviction of a felony or aggravated felony." *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting) (footnotes & citation omitted); *accord Forbes*, 16 F.3d at 1298. The Ninth Circuit has no doubt that this was so: " . . . § 1326(a) and (b) stand alone, each with its own elements and sentence provisions." *United States v. Oliver*, 60 F.3d 547, 553-54 (9th Cir. 1995). Moreover, the inference that Congress intended to incorporate the elements of subsection (a) into the provisions of (b) is bolstered by the subsequent passage of § 1326(d), as discussed in Section I.B.3., *supra*.

In this regard, it is also notable that subsection (b) states that it applies "in the case of any alien described in" subsection (a); it does **not** say "in the case of any alien **convicted of**" the offense set forth in subsection (a). *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting). Congress could easily have provided that subsection (b) would apply in the case of a "conviction under subsection (a)" or in the case of a "violation of subsection (a)" – and, indeed, it has used such language in a number of provisions which are unmistakably intended to be sentencing enhancements.[15] As this Court has observed, "When Congress intended that the defendant have been previously convicted, it said so," by explicitly using words like "conviction" or "convicted." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 489 n.7 (1985). That Congress did not do so

---

[15] *See, e.g.*, 18 U.S.C. § 924(e); 18 U.S.C. § 3147; 21 U.S.C. § 841(b).

in this case is a strong indication that it did not intend for § 1326(b) to be predicated upon conviction under § 1326(a).

Additionally, the phrase "[i]n the case of an alien described in [subsection (a)]" in § 1326(b) is quite similar to the phrase "[in] the case of a person who receives, possesses, or transports. . . . " contained in the former ACCA. In both instances, the statutes make reference to the case of one who has committed certain conduct. Yet, the courts interpreting the former ACCA had agreed that the quoted phrase from that provision did **not** predicate punishment on, or refer to, conviction under another statute within the meaning of the first *Garrett* factor.[16] Congress's use of the analogous phrase in 1988 must be interpreted against the backdrop of these court cases from the same time period. *Cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

Furthermore, "the use of the phrase '[n]otwithstanding subsection (a),' if anything, argues in favor of holding that the drafters of subsection (b) intended it to be a separate offense." *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting) (footnote omitted). And, as discussed

---

[16] *See Davis*, 801 F.2d at 755-56; *see also Rumney*, 867 F.2d at 718 (agreeing that first *Garrett/Davis* factor is not satisfied; citing *Davis*); *Rush*, 840 F.2d at 577 (same); *cf. Jackson*, 824 F.2d at 23-24 (discussing this holding from *Davis* and opining that this "observation ha[s] force").

above, the history of the amendments to § 1326, taken as a whole, indicates that Congress has always intended that § 1326(b)(1) and (b)(2) were separate offenses, not merely sentencing enhancements of the offense set out in § 1326(a).

In sum, there is no indication of any intent to predicate punishment under § 1326(b) upon conviction under § 1326(a). The first *Garrett* factor, therefore, counsels that § 1326(b)(1) and (b)(2) be construed as independent offenses, not sentencing enhancements.

2. Does the Statute Multiply the Penalty Received under Another Section?

The answer to this question is clearly "No": "a separate penalty is set out [in § 1326(b)], rather than a multiplier of the penalty established for some other offense." *Garrett*, 471 U.S. at 781; *cf. Rush*, 840 F.2d at 579 (Gibson, J., dissenting) ("the existence of a discrete offense is indicated by the fact that the provision carries its own penalty, 'rather than a multiplier of the penalty established for some other offense' "; citing *Garrett*). The second *Garrett* factor, therefore, counsels that § 1326(b)(1) and (b)(2) be construed as independent offenses, not sentencing enhancements.

Moreover, as Judge King noted in her dissent in *Vasquez-Olvera*, "[c]ommon sense suggests that a 'multiplier' in the context of a sentencing enhancement statute generally refers to an increase by two or three fold at the most. However the potential for such a draconian increase under subsection (b) – from a maximum of two to fifteen years, i.e., over a seven-fold increase – suggests

that a separate offense was intended."[17] *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting), citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Judge King correctly suggested that construing factors producing such a large increase in punishment as sentencing enhancements, rather than essential elements of new offenses, creates the specter of a sentencing fact's being the "tail which wags the dog of the substantive offense" warned of in this Court's opinion in *McMillan*. *See Vasquez-Olvera*, 999 F.3d at 948 (King, J., dissenting); *see also McMillan*, 477 U.S. at 88. As discussed in more detail below, this Court should certainly construe § 1326(b) in such a fashion as to avoid the thorny constitutional questions adverted to by Judge King: i.e., this Court should hold that, as a matter of statutory construction the "felony" and "aggravated felony" provisions of § 1326(b)(1) and (b)(2) are essential elements of two separate criminal offenses created in those two subsections.

3. Does the Statute Provide Guidelines for the Sentencing Hearing?

It is universally conceded that § 1326(b) does not satisfy this third *Garrett* factor. *See, e.g., Vasquez-Olvera*, 999 F.2d at 945. This is yet another indication that

[17] Since the time of Judge King's dissent, the increase described by her as "draconian" has become even more so. In 1994, the penalties for a violation of § 1326(b)(1) and (b)(2) were increased from 5 and 15 years imprisonment, to 10 and 20 years imprisonment, respectively. Pub. L. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (Sept. 13, 1994). Thus, the seven-fold increase described by Judge King has now become a ten-fold increase.

§ 1326(b)(1) and (b)(2) were intended to constitute new, independent offenses rather than just sentencing enhancements.

4. Is the Statute Titled as a Sentencing Provision?

The individual subsections of § 1326 are not separately titled, and the title of § 1326 sheds no light on the question at hand. At the time relevant to this case, § 1326 was entitled "Reentry of deported aliens; criminal penalties for reentry of certain deported aliens."[18] Although the title might plausibly be construed as setting out one substantive crime in subsection (a) and additional sentencing enhancements in subsection (b), "a competing interpretation is equally permissible. The bifurcated structure of § 1326 and the apparent incorporation of the elements of subsection (a) into subsection (b) might also suggest that Congress intended the broad title of the offense ('reentry of deported alien') to apply to both separate offenses in the different subsections."[19] *Forbes*,

[18] Under the second set of 1996 amendments, the title of § 1326 has been changed to "Reentry of removed alien; criminal penalties for reentry of certain removed aliens." Pub. L. 104-208, Div. C, Title III, §§ 308(e)(14), 309, 110 Stat. 3009 (Sept. 30, 1996).

[19] Moreover, the presence of the word "penalties" in the title is of very little significance, since Congress has frequently placed substantive offenses into subsections of statutory sections entitled "Penalties." For example, 18 U.S.C. § 924 is entitled "Penalties"; yet, this Court has held that § 924(c) describes a separate offense, not just a sentencing enhancement. *See Simpson v. United States*, 435 U.S. 6, 10 (1978). *See also, e.g.*, 8 U.S.C. § 1306; 18 U.S.C. § 844.

16 F.3d at 1298, *citing Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting); *cf. Vieira-Candelario*, 811 F.Supp. at 767 (statute's title is, at best, ambiguous).

Indeed, "Congress could have easily titled subsection (b) as a penalty provision, which it chose not to do; the failure to do so is noteworthy." *Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting). Congress not only knows how to do so, but has in fact frequently done so.[20] The absence of such language here suggests that Congress "apparently incorporated subsection (a)'s elements into subsection (b) suggesting that subsection (b) was intended to be independent of subsection (a)." *Id.*

In sum, the language and structure of § 1326 compel the conclusion that, in 8 U.S.C. § 1326(b)(1) and (b)(2), Congress intended to create new, independent criminal offenses, rather than just sentencing enhancements for the already-existing offense in subsection (a). Analysis of the four factors gleaned from this Court's decision in *Garrett* supports this conclusion. Accordingly, this Court should find that § 1326(b)(1) and (b)(2) create new offenses, and that the "felony" and "aggravated felony" provisions of those subsections are essential elements which must be pleaded in the indictment and proved beyond a reasonable doubt.

---

[20] *See* footnote 9, *supra*.

D. Even If It Is Permissible to Consult Legislative History to Clarify a Textually Ambiguous Statute, the Legislative History Surrounding the Provisions at Issue Here is Not Helpful.

The courts have noted that there is no legislative history which sheds any light on this subject. *See Forbes*, 16 F.3d at 1298; *Vasquez-Olvera*, 999 F.2d at 946 n.5; *see also id.* at 949 (King, J., dissenting); *cf. Campos-Martinez*, 976 F.2d at 592 ("We do not find [§ 1326(b)'s] legislative history useful in this case."). Thus, to the extent that legislative history may be consulted to divine the legislative intent behind a textually unclear legislative pronouncement,[21] the legislative history does not alter the conclusion reached above – that Congress intended for § 1326(b)(1) and (b)(2) to comprise new federal offenses, not merely sentencing enhancements of the offense in § 1326(a).

E. At Best, the Statute in Question is at Least Ambiguous; and, in that Case, the Rule of Lenity Requires that § 1326(b)(1) and (b)(2) Be Read as Creating New Offenses.

As set forth above, the language and structure of § 1326, viewed through the prism of the amendments to that statute, plainly establish that Congress intended to

---

[21] *But see United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.) ("[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history.").

create new, separate offenses in § 1326(b)(1) and (2), not merely sentencing enhancements of the offense described in (a). Whether or not one agrees with this position, however, one thing is certainly clear – the language, structure, and legislative history of the statute in question do **not** establish that the government's contrary position is unambiguously correct. To paraphrase Justice Scalia, "[e]ven if the [Court] does not consider the issue to be as clear as [Petitioner] do[es], [it] must at least acknowledge . . . that it is eminently debatable – and that is enough, under the rule of lenity, to require finding for the petitioner here." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting). "In these circumstances – where text, structure, and history fail to establish that the Government's position is unambiguously correct – [this Court] appl[ies] the rule of lenity and resolve[s] the ambiguity in [the petitioner's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994), *citing Bass*, 404 U.S. at 347-49; *see also Ladner v. United States*, 358 U.S. 169, 177 (1958). Therefore, should any doubt remain as to whether § 1326(b)(1) and (b)(2) were intended by Congress to create new offenses, the rule of lenity nevertheless compels that conclusion. *See Vasquez-Olvera*, 999 F.2d at 949-50 (King, J., dissenting) (dissent would hold that rule of lenity compels conclusion that § 1326(b)(1) and (b)(2) set out separate offenses, not just sentencing enhancements).

F. Construing § 1326(b)(1) and (b)(2) as Independent Offenses Rather Than Sentencing Enhancements Is Consistent With the Canon of Statutory Construction Requiring Courts to Choose a Plausible Construction Which Avoids Serious Constitutional Problems.

This Court has long held that "where a statute is susceptible of two constructions, by one of which grave

and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (citation omitted). Thus, " '[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' " *United States v. LaFranca*, 282 U.S. 568, 574 (1931), *quoting United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (other citations of authority omitted). *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 628-29 (1993) (referring to this rule of statutory construction as a "hoary one" and collecting authorities).

As demonstrated in the discussion in Section II., *infra*, to hold that Congress intended for § 1326(b)(1) and (b)(2) to be only sentencing enhancements rather than independent offenses raises difficult constitutional questions about the constitutional limitations of Congress's power to circumvent the requirements of grand jury indictment, jury trial, due process, and proof beyond a reasonable doubt by calling a critical fact a "sentencing factor" rather than an essential "element" of a criminal offense. This Court can, and should, avoid these difficult questions by construing § 1326(b)(1) and (b)(2) as separate criminal offenses rather than as sentencing enhancements of the offense set out in § 1326(a).

II. THE CONSTITUTION REQUIRES THAT, IN A FEDERAL CASE, WHENEVER THE MAXIMUM IMPRISONMENT RANGE IS INCREASED BASED ON A FACT, THAT FACT MUST BE ALLEGED IN THE INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT IN A JURY TRIAL.

A. Introduction.

A major problem with the Fifth Circuit's analysis in *Vasquez-Olvera*, is that it ignores the traditional rule that facts which increase the maximum sentence must be alleged in the formal charging document, and proved beyond a reasonable doubt. The traditional rule is based on fundamental rights guaranteed by our Constitution. A crime is made of two parts, the facts that constitute the prohibited act and the penalty for those facts. When the existence of a fact raises the statutory maximum sentence, the defendant is entitled to have that fact alleged in the indictment and proved to a jury beyond a reasonable doubt.

In 8 U.S.C. § 1326(b)(2), the determinative fact of a previous aggravated felony conviction results in a drastically greater maximum sentence. Therefore, the United States Constitution requires that such fact must be alleged in an indictment and proved to a jury beyond a reasonable doubt.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. . . . or be deprived of life, liberty or property, without due process of law. . . . " The Sixth Amendment provides that "[i]n all

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . , and to be informed of the nature of the accusation against him; to be confronted with the witnesses against him;. . . . "

Thus, a federal felony defendant has the right to be charged by a grand jury indictment, which indictment must " ' . . . set forth all the elements of the offense intended to be punished.' " *Hamling v. United States*, 418 U.S. 87, 117 (1974), *quoting United States v. Carll*, 105 U.S. 611, 612 (1882)). Furthermore, once charged, the defendant has the right to compel the government to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). And, the defendant has a right to have these facts determined by a jury. *United States v. Gaudin*, 515 U.S. 506, ___, 115 S.Ct. 2310, 2314 (1995).

B. The Punishment Defines the Crime.

In Professor Wayne LaFave's words: "a crime is made up of two parts, forbidden conduct, and a prescribed penalty. The former without the latter is no crime." 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 1.2(d) (1986); *see also United States v. Evans*, 333 U.S. 483, 485, 495 (1948); *United States v. Eaton*, 144 U.S. 677, 686 (1892). Indeed, this Court has noted that, by "the severity of the penalty authorized," "the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank v. United States*, 395 U.S. 147, 149 (1969).

Crimes are categorized by the maximum penalties prescribed for the offense, e.g., capital offense, felony offense, or petty offense. This notion is embodied in the plain words of the Constitution, where the right to grand jury indictment depends on the extent of the potential penalty for the offense, and the quantum of process due is likewise predicated on the possible penalty.

The right to jury trial depends on the "severity of the maximum authorized penalty," *Baldwin v. New York*, 399 U.S. 66, 68 (1970); *see also id.* at 73-74, because "[i]n such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank*, 395 U.S. at 149. *See Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968); *Schick v. United States*, 195 U.S. 65, 68 (1903). The maximum potential penalty also governs the right to indictment by a grand jury. *Ex parte Wilson*, 114 U.S. 417, 423 (1885) ("[W]hether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow-citizens depends upon the consequences to himself if he shall be found guilty. . . . ") (citing Blackstone, James Madison, and the Journal Massachusetts Convention 1788).

The degree of proof required depends as well on the potential punishment. *See, e.g., Addington v. Texas*, 441 U.S. 418, 423-26 (1979). "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties," where "the burden of proof is a mere preponderance of evidence." *Id.* at 423. "In a criminal case on the other hand, the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof . . . beyond a reasonable doubt." *Id.* at 423-24. This Court noted: "There are significant reasons

why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense." *Id.* at 428.

With regard to the penalty of denaturalization, this Court has said, " . . . in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside – the evidence must indeed be 'clear, unequivocal, and convincing' and not leave the issue in doubt." *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (citations omitted). Likewise, with regard to the penalty for deportation, "it does not . . . follow that a person can be banished from this country upon no higher degree of proof than applies in a negligence case." *Woodby v. INS*, 385 U.S. 276, 285 (1966). Under the reasoning of these cases, where, as here, the resolution of the fact issue can result in imprisonment for twenty years, the degree of proof must be beyond a reasonable doubt.

C. The Common Law and State and Federal Practice.

At common law, and into the twentieth century, it was nearly universally held that prior convictions must be alleged in an indictment or information[22], and proved

---

[22] This Court has held that the right to a grand jury indictment was not incorporated by the Fourteenth Amendment. Thus defendants in state court do not have the right to an indictment. *Hurtado v. California*, 110 U.S. 516, 538 (1884). The Fifth Amendment right to grand jury indictment of course does apply to this federal prosecution. The point is that states have traditionally required the allegation of a prior conviction to be present in whatever formal charging document

beyond a reasonable doubt to a jury. This Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, ___U.S.___, 116 S.Ct. 2013, 2017 (1996). The Constitution "must be read in the light of the common law." *Schick*, 195 U.S. at 69. The common law "does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' " *In re Winship*, 397 U.S. at 361-62 (citations omitted). At the time of the passage of the United States Constitution and the Bill of Rights, the common understanding was that facts, such as prior convictions, which formed the basis for an increase in the maximum sentence, must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

In *People v. Sickles*, 156 N.Y. 541, 51 N.E. 288 (1898), the court was faced with a recidivist statute that raised the maximum sentence. The court noted

> The indictment . . . must bring the case within the statute by setting forth the facts depended upon for the imposition of the severer punishment . . . This is necessary in penal proceedings, in order that the defendant may be informed of the charge which he is called upon to meet. . . . it is in accord with all just penal legislation. "In a case such as this, the charge is not merely that the prisoner has committed the offense specifically described, but that,. . ., his second offense has subjected him to an enhanced penalty. . . . **it was an essential ingredient of the aggravated**

---

and procedure each state utilized, which in this case is a grand jury indictment.

> **offense, . . . , that the alleged felony was committed after a former conviction . . . and that the prior conviction entered into and made a part of the offense of which the accused was convicted."**

Id. at 544-45, 51 N.E. at 289 (emphasis added & citations omitted). The court added that "as 'a more severe penalty is denounced by the statute for a second offense, all the facts to bring the case within the statute must be established upon the trial.' " *Id.* at 545, 51 N.E. 289 (citation omitted). The court further noted that in England "the former conviction is regarded as an element entering into the grade of the guilt of the defendant, inasmuch as proof must be made of it, and the jurors must deliver their verdict upon that proof." *Id.* at 546, 51 N.E. at 289-90.

The court went on to state that

> In a sense, the prior offense was not an element of the second offense, for they were disconnected acts; but the prior conviction so affected the grade of the prisoner's guilt and the degree of his liability to punishment that, in that sense, it entered into the offense of which he is convicted . . . **as a necessary and logical conclusion, where an increased punishment is prescribed . . . the prior conviction enters as an ingredient into the criminality of the prisoner** . . . it aggravates the guilt of the prisoner, and . . . subjects him to an increased punishment . . .

Id. at 546-47, 51 N.E. 290 (emphasis added).

Later, after New York changed its laws and allowed for a bifurcated, post-verdict proceeding, initiated by information, the government had argued that the burden

to prove the prior conviction should be a preponderance because this was not a trial on guilt or innocence. The court responded that the proper burden remains beyond a reasonable doubt because

> [t]he proceeding determines a fact upon which depends the extent of his imprisonment. To be sure, his guilt of the crime for which he was indicted has already been determined, . . . [but] [t]he **fundamental question is the same, and the rights of the defendant are entitled to the same protection in the one case as in the other.**

People v. Brennan, 242 N.Y.S. 692, 694-95 (1930) (emphasis added). The decisions in *Sickles* and *Brennan* reflect the common law rule as well as the overwhelming authority at the time.[23]

---

[23] The cases in accord with the position that prior convictions which raise the statutory maximum sentence must be alleged in the indictment and/or proved to a jury beyond a reasonable doubt are too numerous to list *in toto*, but some of the more noteworthy cases are: *Cosgriff v. Craig*, 195 N.Y. 190, 194-95, 88 N.E. 38, 39 (1909) (if fact of prior conviction causes increased sentence in range already subject to court's discretion, no violation of individual rights, but if that fact increases the maximum penalty that fact is an integral part of the offense itself); *Maine v. McClay*, 146 Me. 104, 107-08, 78 A.2d 347, 350 (1951) (rule so "generally held" that a detailed review of the authorities would serve no useful purpose"; relies upon "*Tuttle v. Commonwealth*, 2 Gray, Mass., 505, at page 506: –" which states the rule "is required by a rule of the common law, and by our own Declaration of Rights, art. 12.") (additional citations & internal quotation marks omitted); *People v. McDonald*, 233 Mich. 98, 102, 105, 206 N.W. 516, 518, 519 (1925) (basis for rule is that the "nature of the punishment which the statute provides may be inflicted is presumed to depend on the enormity of the offense of which the accused has been convicted"); *Long v. State*,

Federal authority has also held that facts, such as prior convictions, which increase the maximum sentence, must be alleged in the indictment or information and

---

36 Tex. 6, 10 (1871) (a contrary position would "cut away so much of the pillars of our liberty"); *Riggins v. Stynchcombe*, 231 Ga. 589, 592-93, 203 S.E.2d 208, 212 (1974) (even under a bifurcated procedure must allege prior in indictment, based on the right to grand jury indictment); *People v. Casey*, 399 Ill. 374, 378-79, 77 N.E.2d 812, 815 (1948) ("We can perceive of no reason" for a different procedure because the fact at issue "inflicts a penalty of additional years upon a defendant"; to hold otherwise "would be contrary to the law of what is right and just"); *State v. Smith*, 106 N.W. 187, 188-89 (Iowa 1906) (the rule is supported by "the uniform current authority"; a contrary result "would amount to a travesty"); *State v. Pennye*, 102 Ariz. 207, 209, 427 P.2d 525, 527 (1967) (relies upon the presumption of innocence); *State v. Martin*, 162 Wis.2d 883, 900-01, 470 N.W.2d 900, 907 (1991) (The rule is required to "meet the due process requirements of a fair trial. When the defendant is asked to plead, he is entitled to know the extent of his punishment."); *State v. Furth*, 5 Wash.2d 1, 11-19, 104 P.2d 925, 930-933 (1940) (extended discussion of the case law and history; finding it is the "general rule."); *State v. Ruble*, 77 N.D. 79, 90, 40 N.W.2d 794, 800 (1950) (reviews history and concludes it is the "general rule recognized in most jurisdictions"); *State v. Waterhouse*, 209 Or. 424, 428-433, 307 P.2d 327, 329-331 (1957) (detailed history of common law); *State v. Cobb*, 2 Ariz.App. 71, 76, 406 P.2d 421, 426 (1965) (relies upon the presumption of innocence); *Robbins v. State*, 219 Ark. 376, 380-81, 242 S.W.2d 640, 643 (1951) (general rule; collection of authority); *Lockmiller v. Mayo*, 88 Fla. 96, 98-99, 101 So. 228, 229 (1924) (rule applies whether the prior conviction is described as "merely an increased punishment" or as "a new offense"); *Evans v. State*, 150 Ind. 651, 50 N.E. 820 (1898) (collection of authorities); *State v. Eichler*, 248 Iowa 1267, 1270-73, 83 N.W.2d 576, 577-79 (1957) (good collection of authority); *Roberson v. State*, 362 P.2d 1115, 1119 (Okla. Crim. App. 1961) (contrary position violates right to grand jury indictment).

proved to a jury beyond a reasonable doubt. In *Massey v. United States*, 281 F. 293, 297-98 (8th Cir. 1922), the court noted:

> Statutes providing for greater punishment of second or subsequent offenses by the same person have long been in force in this country and in England . . . and are to be found in the legislation of nearly every state in the Union. It is the established rule, under such statutes, unless the statute designates a different mode of procedure, that, if the prosecutor desires to invoke the severer punishment provided as to second or subsequent offenders, the indictment or information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury. . . . The statement of a prior conviction is regarded as a part of the description and character of the offense intended to be punished, and as an essential ingredient of such aggravated offense. The accused is entitled to have the exact charge against him stated in the indictment or information, and to have the verdict of the jury upon the fact of a prior conviction for the same offense, and of his identity with the person so convicted, and it is the duty of the government which prosecutes to allege and prove the existence of the prior conviction of the accused as a fact that may cause a severer penalty to be imposed.

(Citations omitted; the court cited forty-two separate cases and seven treatises.)

In *Singer v. United States*, 278 F. 415, 420 (3rd Cir. 1922), *cert. denied*, 258 U.S. 620 (1922), the court held that

> While in common parlance a verdict of guilty is said to be a conviction, it must be given its strict legal meaning when a second offense is made a distinct crime, carrying with it heavier penalties. The authorities overwhelmingly establish, first, that in the legal sense a conviction is a judgment on a plea or verdict of guilty; . . . , the indictment, charging the accused of being a second offender, must set forth the fact of the prior conviction, as that is an element of the offense in the sense that it aggravates the offense described in the indictment, and authorizes the increased punishment.

This Court has also required that facts that increase the maximum punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

D. The Supreme Court Authority.

This Court's direct authority is that facts which increase the maximum sentence must be alleged in the indictment and proved to a jury beyond a reasonable doubt. First, in *Schooner Hoppet and Cargo v. United States*, 11 U.S. 389 (1813), the Court, in an opinion written by Chief Justice John Marshall, stated:

> The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and **state such a crime as will justify the judgment to be pronounced.**

> The reasons for this rule are,
>
> 1st. That the party accused may know against what charge to direct his defence.
>
> 2d. **That the Court** may see with judicial eyes that the fact, alleged to have been committed, is an offence against the laws, and **may also discern the punishment annexed by law to the specific offence.**

Id. (emphasis added). Thus, this Court long ago held that one should be able to tell from the facts alleged in the indictment or information the maximum sentence at issue. The Court also held that, though there was a violation found, the sentence could not exceed that authorized by the allegations in the information. *Id.* at 394.

In *Chandler v. Fretag*, 348 U.S. 3 (1952), the Court held that a defendant had the right to an attorney in a case where a prior conviction increased the maximum penalty. The Court treated the issue as controlled by the rights a defendant has in a criminal trial as explicated in *Powell v. Alabama*, 287 U.S. 45 (1932).

In *Chewning v. Cunningham*, 368 U.S. 443 (1962), the Court was again faced with a recidivist charge in which the defendant, after being charged by information, was sentenced to ten years in prison after a jury trial on the issue. Again, the defendant claimed he had a right to an attorney on the issue. This Court agreed. The Court noted the court below conceded "that a proceeding under the recidivist statute was 'criminal' and that in that proceeding the accused was entitled to most of the protections afforded defendants in criminal trials, . . . " *Id.* at 445. The Court referred to the recidivist allegation as a "charge":

> "It is 'The nature of the charge' . . . that underlines the need for counsel." *Id.* at 446. The Court also refers to the proceeding as a "trial": "[w]e only conclude that a trial on a charge of being a habitual criminal is such a serious one . . . **that the rule we have followed concerning the appointment of counsel in other types of criminal trials is equally applicable here.**" *Id.* at 447 (emphasis added).

In *Specht v. Patterson*, 386 U.S. 605, 609 (1967), the Court, following the unbroken line of common law decisions referred to above, found that a defendant in a hearing under a recidivist statute is entitled to the full panoply of rights to ensure a fair trial. This is because the hearing requires "a new finding of fact," and because the potential consequence was "criminal punishment. . . . " *Id.* at 608. The Court concluded:

> **'A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial,** including the right to confront and cross-examine the witnesses against him.' . . .
>
> . . . The case is not unlike those under recidivist statutes where an habitual criminal issue is 'a distinct issue' (*Graham v. State of West Virginia*, 224 U.S. 616, 625, . . .) on which a defendant 'must receive reasonable notice and an opportunity to be heard.' *Oyler v. Boles*, 368 U.S. 448, 452, . . . ; *Chandler v. Fretag*, 348 U.S. 3, 8, . . . Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against

> him, have the right to cross-examine, and to offer evidence of his own.

Specht, 386 U.S. at 609-10 (emphasis added & some citations omitted).

This Court has never altered this view. The rule is that if the state establishes a maximum penalty based on a certain set of facts, those facts must be alleged and proved beyond a reasonable doubt in a jury trial. In other words, the legislative body can determine what facts are important enough to subject one to liability for a certain range of punishment. But once it does so, those facts must be alleged in a formal charging instrument required for any criminal accusation, and proved beyond a reasonable doubt in a jury trial. *Cf. McMillan*, 477 U.S. at 98 (Stevens, J., dissenting).

A comparison of this Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), elucidates this point. In *Mullaney*, the Maine statute provided that for a defendant to face a life sentence, the state must prove that he acted with "malice aforethought." In Mullaney's trial, the jury was told to presume the existence of that fact. Thus, the state had deemed "malice aforethought" to be a fact so important that it must be proved to warrant the enhanced sentence. Therefore, the state was required to prove that element beyond a reasonable doubt. *Patterson*, 432 U.S. at 216 (discussing holding of *Mullaney*); *see also id.* at 221 (Powell, J. dissenting) (same).

The Court in *Mullaney* noted:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Mullaney, 421 U.S. at 698.

In *Patterson*, the Court was faced with a statute that exposed the defendant to the full range of punishment for second degree murder if the state proved the defendant both possessed the intent to cause death and did cause the death of another. The state explicitly created an affirmative defense to the charge where the defendant acted under extreme emotional disturbance for which there was an adequate cause. The Court noted that "[i]t is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances." *Id.* at 206.

The Court also found that the states are free to define offenses, and that the reasonable-doubt standard applies to the state's definition. In other words, the state is free to determine what facts justify a certain punishment, and those facts must be proved beyond a reasonable doubt;

but even this rule was subject to constitutional limits. *Id.* at 211 n.12. The Court then examined the statute to determine if it went beyond the constitutional limits. The Court was addressing the concern that traditional elements would be turned into affirmative defenses to evade the requirements of *Winship*. The Court looked to the common law, and found that the affirmative defense in *Patterson* was a new creation. Furthermore, the closest analogue, the defense that the defendant acted under "the heat of passion upon sudden provocation," was not traditionally an element of the offense that the prosecution bore the burden of proving, despite recent trends. *Patterson*, 432 U.S. at 202.

Here, the common law is clear that traditionally the government does bear the burden of proving the prior convictions in a jury trial if the convictions result in a higher penalty range. Here, the legislature made the higher penalty range applicable only if the fact of an aggravated felony conviction is proved. There certainly is no explicit legislative enactment as in *Patterson* indicating that the defendant faces the higher punishment unless he can prove he has no felony conviction.

This Court's decision in *Addington* also clearly indicates that the law requires proof beyond a reasonable doubt of facts that would increase the maximum punishment. In *Addington*, the Court required a higher standard of proof than a preponderance of the evidence in a civil commitment procedure. *Addington*, 441 U.S. at 432-33. The Court pointed out that a greater standard of proof than the preponderance standard applicable in negligence cases is required when the government seeks to take away a non-monetary, or liberty interest, such as

when it seeks to deport or denaturalize a citizen. *Id.* at 423-24. The Court did not require proof beyond a reasonable doubt specifically because: 1) the loss of liberty was not punitive, *id.* at 428; 2) "the layers of professional review and observation of the patient's condition, and the concern of the family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected," i.e., the confinement depends on the patient's mental condition, and if he gets better, he can go home, *id.* at 428-29; 3) if the patient is erroneously released, he could suffer great harm, *id.*; and 4) the determinative issue is so complex that, unlike the factual issues in a criminal case, "there is a serious question whether a state could ever prove [it] beyond a reasonable doubt . . . " *Id.* at 429. Here, the loss of liberty is 1) punitive; 2) for a definite term of years; 3) the imprisoned person would not be harmed by his release; and 4) the determinative issue is a straightforward fact issue capable of resolution by jurors using the beyond-a-reasonable-doubt standard of proof. Thus, *Addington* requires proof beyond a reasonable doubt for facts which increase the statutory maximum.

McMillan v. Pennsylvania, 477 U.S. 79 (1986), provides further support for Petitioner's position. There the Court was faced with a statute that required a mandatory minimum sentence if a sentencing court found, by a preponderance of the evidence, that the defendant had visibly possessed a firearm during the commission of the offense. Significantly, the mandatory minimum sentence was within the range of punishment the defendant already faced based on the facts found by the jury. The Court, in a five to four decision, found that, under this scheme, the

Constitution did not require the state to prove this fact issue beyond a reasonable doubt. *Id.* at 85-86. The majority, on no less than four separate occasions, emphasized that the finding of fact at issue did not increase the maximum sentence beyond that already applicable based on the facts found by the jury beyond a reasonable doubt. *Id.* at 82, 83, & 87-88. The Court noted that the statute

> . . . neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [The statute] "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.

Id. at 88. In this case of course, the potential sentence has increased from a maximum of two years to a maximum of twenty years based on the existence *vel non* of a particular fact. Thus, that fact must be proved beyond a reasonable doubt. This fact finding is the "tail which wags the dog." It is the most important fact issue under the statute.

Furthermore, the majority to some extent relied upon the fact that the state clearly, explicitly, and unequivocally stated in the statute that the fact issue in question, the use of a firearm, "shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction," and that the issue "shall be determined at

sentencing . . . by a preponderance of the evidence . . . . " *Id.* at 81 n.1. To the extent that the Court in *McMillan* relied on Pennsylvania's explicit declaration that visible possession of a firearm was not an element of the offense, *McMillan* is distinguishable from the case at bar where there is no such declaration. On the contrary, as noted above, Congress has referred to Subsection (b) of 8 U.S.C. § 1326 as an "offense." *See* discussion in Section I. B., *supra*.

The majority in *McMillan* also relied upon the fact that "petitioners do not contend that the particular factor made relevant here – visible possession of a firearm – has historically been treated 'in the Anglo-American legal tradition' as requiring proof beyond a reasonable doubt . . . . " *Id.* at 90. Here, the fact issue – whether the defendant has previously been convicted of a prior conviction – has historically been treated in the Anglo-American legal tradition as requiring proof beyond a reasonable doubt.

The Constitution guarantees that every fact that must be proved to increase the statutory maximum punishment must, in a federal case, be alleged in the indictment, and proved beyond a reasonable doubt to a jury.[24] That guarantee was violated in this case.

---

[24] If this were not the case, how could a court comply with Rule 11(c) of the Federal Rules of Criminal Procedure, which requires the district court to determine whether the defendant understands the maximum possible penalty provided by law before accepting a plea of guilty to an offense alleged in an indictment or information? The court would not know that until the sentencing hearing, if the issue were merely a sentencing issue.

Of course, this Court need not reach the constitutional issues in this case if the Court decides the case as a matter of statutory construction as urged in Section I., *supra*. Likewise, the Court may avoid the constitutional issues in this case by exercising its supervisory power over the lower federal courts. *E.g., Davis v. United States*,

---

More importantly, a defendant would be forced to make the decision to plead guilty or go to trial based on his understanding of the offense alleged and the potential penalty, only to have the penalty increase drastically after he has foregone his rights. The subsequent imposition of penalty will then be based on facts to which the defendant did not plead guilty.

Also, a court would not know how to proceed under a statute under which certain fact findings raise the penalty from a petty offense to a felony offense such as 18 U.S.C. § 2701. In 18 U.S.C. § 2701, Congress created a statute that is divided into three parts: "(a) Offense," "(b) Punishment," and "(c) Exceptions." The "punishment" section establishes a punishment of either six months under (b)(2), one year under (b)(1)(A), or two years under (b)(1)(B). Certain facts determine the differences in maximum penalties. The defendant does not have a right to indictment if he ends up being sentenced under (b)(2) or (b)(1)(A). But he would have a right to an indictment under (b)(1)(B). Likewise the defendant would not have a right to a jury trial under (b)(2) but he would have a right to a jury trial if sentenced under (b)(1)(A) or (b)(1)(B). If it is not necessary to allege in the indictment the facts that would justify the higher maximum sentences, a court would not know, until after the trial, and at sentencing, whether the defendant had a right to a jury trial and/or to a grand jury indictment in the first place. It makes far greater sense to adhere to the common law view, and that expressed by this Court so long ago in *Schooner Hoppet*, that it is a fundamental requisite that the indictment or information set out the facts necessary to justify the maximum punishment so that the court, and the defendant, will be able to tell from the indictment or information what is at stake.

160 U.S. 469, 484-93 (1895) (requiring proof beyond a reasonable doubt to prove defendant sane in federal case); *compare Leland v. Oregon*, 343 U.S. 790, 797 (1952) (*Davis* decision is a federal rule, not constitutional doctrine). The Court's supervisory powers must be guided by the common law, state and federal authority, and considerations of justice. *See United States v. Hasting*, 461 U.S. 499, 505 (1983) ("[G]uided by considerations of justice, . . . and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.") (citation and internal quotation marks omitted); *cf. Victor v. Nebraska*, ___U.S.___, 114 S.Ct. 1239, 1248 (1994) (recognizing supervisory power over federal courts and implying that supervisory power might be used to require certain form of reasonable doubt instruction, over and above constitutional requirements). These considerations compel the result that 8 U.S.C. § 1326(b)(1) and (b)(2) sets forth separate offenses, and that each of the facts set forth therein must be alleged in the indictment and proved to a jury beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

Respectfully submitted,

PETER FLEURY*
TIMOTHY CROOKS
Assistant Federal Public Defenders
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
(817) 978-2753
Counsel for Petitioner

**Counsel of Record for Petitioner*

APPENDIX A

APPENDIX A

Title 8, United States Code, Section 1326

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported to excluded and deported, and thereafter

(2) enters, attempts to enter or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (b) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

APPENDIX B

APPENDIX B

Amendments to Title 8, United States Code, Section 1326

1952 Version

§ 1326. Reentry of deported alien

Any alien who –

(1) has been arrested and deported or excluded and deported, and thereafter.

(2) enters, attempts to enter, or is at any time found in, the United States, unless (a) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

1988 Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, ~~A~~any alien who –

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (a) prior to his reembarkation at a place outside of the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated

felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

1990 Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported, or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

~~**shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000,**~~ **shall be fined under title 18, or imprisoned not more than 2 years, or both.**

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

1994 Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported, or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (Other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than ~~15~~ 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

1996 I Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported, ~~or~~ has been excluded and deported, or has departed the United States while an order of exclusion or deportation is outstanding, and thereafter.*

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under †Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under †Title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such †Title, imprisoned not more than 20 years, or both; or

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during (or not during) a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation

order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that –

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

*This period is in the original.

1996 II Version

(Additions in bold; deletions struck out)

§ 1326. Reentry of ~~deported~~ **removed** alien; criminal penalties for reentry of certain ~~deported~~ **removed** aliens.

(a) Subject to subsection (b) of this section, any alien who –

(1) has been ~~arrested and deported, or excluded and deported~~, **denied admission, excluded, deported, or removed** or has departed the United States while an order of ~~exclusion or deportation~~ **exclusion, deportation, or removal** is outstanding, and thereafter.

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously ~~excluded and deported~~ **denied admission and removed,** unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose ~~deportation~~ **removal** was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes

against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose ~~deportation~~ **removal** was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both; ~~or~~

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence~~.~~; or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term ~~"deportation"~~ **"removal"** includes any agreement in which an alien stipulates to deportation removal during (or not during) a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that –

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

---

(6)

No. 96-6839

In the Supreme Court of the United States

OCTOBER TERM, 1996

HUGO ROMAN ALMENDAREZ-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

68 pp

QUESTION PRESENTED

Whether 8 U.S.C. 1326(b)(2), which relies on prior criminal history to increase the maximum authorized term of imprisonment for a deported alien who illegally reenters the United States in violation of 8 U.S.C. 1326(a), is a separate criminal offense or a constitutionally valid sentencing enhancement provision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-6839

HUGO ROMAN ALMENDAREZ-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 18-19) is reported at 113 F.3d 515.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1996. The petition for a writ of certiorari was filed on November 20, 1996, and granted on March 31, 1997 (J.A. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

As of July 28, 1995, the date of petitioner's offense, Section 276 of the Immigration and Nationality Act (INA) provided:

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which the alien stipulates to deportation during a criminal trial under either Federal or State law.

8 U.S.C. 1326 (1994).[1]

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of reentering the United

---

[1] Unless otherwise indicated, we refer to the codified version of Section 276 of the INA, 8 U.S.C. 1326 (1994), and its subsections in effect at the time of petitioner's offense. The statute has been amended on two subsequent occasions. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 324, 110 Stat. 3009-606, 3009-618, 3009-619, 3009-620, 3009-629. We set forth the texts of the various versions of the statute as codified in 1952 and after each subsequent amendment, with additions and deletions indicated, at App., *infra*, 1a-14a; see also pp. 15-17, 24-31, *infra* (discussing amendments). Because Title 8 has not been enacted into law, the appendix also notes some differences between the codified versions of Section 1326 and the versions found in the Statutes at Large.

States, after having been deported, without the prior consent of the Attorney General to reapply for admission, in violation of 8 U.S.C. 1326. He was sentenced to 85 months' imprisonment, to be followed by two years' supervised release. J.A. 17. The court of appeals affirmed. J.A. 18-19.

1. a. In 1980, petitioner, a national of Mexico, entered the United States illegally. In 1989, he was adjusted to the status of a lawful permanent resident. On March 11, 1991, petitioner was convicted in Tarrant County, Texas, of burglary of a habitation. On March 14, 1991, he was convicted in Dallas County, Texas, of burglary of a habitation. On July 26, 1991, he was again convicted in Tarrant County of burglary of a habitation. Petitioner was sentenced in state court to a term of imprisonment. In 1992, he was paroled, at which time he was released to the custody of the Immigration and Naturalization Service (INS) pursuant to a detainer. On April 18, 1992, the INS deported petitioner from the United States. See J.A. 6-7, 12-14; Presentence Report (PSR) 1-5.

Two months later, in June 1992, petitioner reentered the United States by crossing the Rio Grande River near Laredo, Texas, and evading inspection by immigration officials. On July 28, 1995, an agent of the United States Border Patrol found petitioner at a jail in Tarrant County, Texas, where petitioner was incarcerated on new, unrelated charges. Investigation revealed that petitioner had not received the prior consent of the Attorney General to reapply for admission, as required under 8 U.S.C. 1326, when an alien who has been previously deported returns to the United States. J.A. 6-7, 13.

b. Section 1326(a) provides that, subject to Section 1326(b), a previously deported alien who reenters the

country without obtaining the prior consent of the Attorney General to reapply for admission shall be sentenced to a term of imprisonment up to two years, or fined under Title 18, or both. Section 1326(b)(2) authorizes a term of imprisonment of up to 20 years in a case where an alien who commits such an offense was convicted of an aggravated felony (defined in 8 U.S.C. 1101(a)(43)) before his deportation.

2. On September 12, 1995, petitioner was charged in the United States District Court for the Northern District of Texas in a one-count indictment, alleging

> [t]hat on or about July 28, 1995, in the Fort Worth Division of the Northern District of Texas, HUGO ROMAN ALMENDAREZ-TORRES, defendant, an alien, who had been previously arrested and deported from the United States on or about April 18, 1992, knowingly and unlawfully was found in the United States, that is, he did not, prior to his re-entry into the United States after being deported, obtain permission and consent of the Attorney General to re-enter the United States.
>
> A violation of Title 8, United States Code, Section 1326.

J.A. 3.

On December 1, 1995, petitioner, without a plea agreement, pleaded guilty to the indictment. PSR ¶ 54. Before acceptance of petitioner's guilty plea, the district court reviewed with petitioner a written statement of the facts and elements of the offense and the authorized maximum sentence, which petitioner, his counsel, and government counsel had signed. See J.A. 5-7, 9. In accord with the signed document, the court informed petitioner that the elements of the

charged offense were (1) that petitioner was an alien unlawfully found in the United States on or about the date alleged; (2) that petitioner had been previously arrested and deported from the United States; and (3) that petitioner had not obtained permission to reenter the United States from the Attorney General. J.A. 5-6, 10. Petitioner stated that he understood the nature of the offense and admitted that each of the elements existed in his case. J.A. 11. Also in accord with the document signed by petitioner, the court informed him that the maximum penalty of imprisonment that could be imposed in his case was ten years, along with a fine and a period of supervised release. J.A. 5, 12. Petitioner stated that he understood that he was exposed to those penalties by his plea of guilty. J.A. 12. As part of the factual basis for his plea, petitioner admitted the details of his immigration history, including his prior deportation and subsequent illegal reentry. He also admitted that, before his previous deportation, he had been convicted in state court on three different occasions of burglary of a habitation. J.A. 13-14.

3. a. The presentence report prepared for petitioner's sentencing stated that the maximum term of imprisonment authorized for petitioner's offense was ten years, PSR ¶ 52, and that the applicable Guidelines range was 77 to 96 months' imprisonment, PSR ¶ 53. In reviewing the PSR, the government realized that the maximum sentence authorized in petitioner's case had been misstated in the PSR and at the plea proceeding and requested that the PSR be corrected to state that the maximum term of imprisonment authorized in the case is 20 years. PSR addendum 1. The government noted, however, that the correction would have no effect on petitioner's case because his

Sentencing Guidelines range was less than the ten years' maximum of which he had been advised. *Ibid.* The PSR was amended to state that the maximum term of imprisonment authorized in this case is 20 years. *Id.* at 1-2; J.A. 16.

Petitioner objected to the PSR, contending that the maximum sentence authorized in his case is two years. He argued that Section 1326(b)(2) defines a substantive offense separate from the offense defined by Section 1326(a) and that the subsection (b)(2) offense contains the additional element of a prior aggravated felony conviction. Because the indictment did not allege that additional "element," petitioner contended that the enhanced penalty authorized in Section 1326(b)(2) is inapplicable to his case. PSR addendum 2; see also J.A. 16-17 (renewing objection at sentencing hearing).

b. The district court overruled petitioner's objection and adopted the findings and conclusions set forth in the PSR and its addendum. J.A. 17. The court sentenced petitioner to 85 months' imprisonment, to be followed by two years' supervised release. *Ibid.*

4. The court of appeals affirmed. It held that petitioner's argument was foreclosed by its opinion in *United States* v. *Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). J.A. 18-19. The court in *Vasquez-Olvera* held that Section 1326(b) is a penalty provision rather than a separate substantive offense. Accordingly, the court in *Vasquez-Olvera* explained, a defendant's aggravated felony conviction need not be charged or proven as an element of the offense in order to support an enhanced maximum sentence under Section 1326(b)(2). 999 F.2d at 945-946.

SUMMARY OF ARGUMENT

Section 1326(b)(2) is a sentencing enhancement provision, not a separate criminal offense. The effect of Section 1326(b)(2) is to lengthen the maximum term of imprisonment to which an alien is exposed when the alien, having committed an illegal-reentry-after-deportation offense under Section 1326(a), is determined to have been convicted before deportation of an aggravated felony. The text, structure, history, and evolution of Section 1326 establish that Congress intended Section 1326(b) to identify sentencing factors bearing on penalty (*i.e.*, a defendant's criminal history before his deportation), not to create a separate and independent criminal offense (in which criminal history would be an element of the crime).

The text of Section 1326 makes that point clear. Section 1326(a) provides that, "[s]ubject to subsection (b)," any alien who has been deported and reenters the country without the prior consent of the Attorney General to reapply for admission shall be sentenced to a term of imprisonment of up to two years, and fined under Title 18, or both. Subsection (a) thus identifies the conduct involved in the illegal-reentry offense. Section 1326(b)(2) provides that, "[n]otwithstanding subsection (a)," when an alien described in that subsection had been deported after a conviction for an aggravated felony, the authorized maximum term of imprisonment is increased to 20 years. Subsection (a) is thus structured so that imposition of a penalty under subsection (b) is predicated on the alien's coverage under (a); subsection (b) simply increases the authorized penalty beyond that provided in (a). A prior conviction that supports an enhanced sentence

under subsection (b) is therefore not an element of the offense and need not be charged or proven at trial.

That straightforward reading of Section 1326(b)(2) as a penalty provision is confirmed by the provision's legislative history. Subsequent legislation is also consistent with that interpretation. Nine courts of appeals have adopted that interpretation, and the reasoning underlying the Ninth Circuit's conflicting ruling is unpersuasive. Finally, the rule of lenity does not require adoption of petitioner's contrary statutory interpretation because there is ample guidance as to Congress's intent.

The Constitution permits Congress to provide, as it has in Section 1326(b), that a sentencing factor enhance the maximum term of imprisonment for a defendant found guilty of an illegal reentry offense. The fact that a prior conviction increases the maximum penalty authorized for a particular offense does not transform the prior conviction into an element of the offense or otherwise require that it be proven beyond a reasonable doubt. The Court has expressly "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 84 (1986) (citing *Patterson* v. *New York*, 432 U.S. 197, 214 (1977)). And a traditional sentencing factor, such as a prior conviction, may constitutionally be treated as a basis for sentence enhancement even where, as under subsection (b), the defendant's criminal record significantly increases the maximum punishment to which he is exposed. See *Graham* v. *West Virginia*, 224 U.S. 616 (1912).

ARGUMENT

SECTION 1326(b)(2) IS A VALID PENALTY ENHANCEMENT PROVISION, NOT A SEPARATE CRIMINAL OFFENSE

It is well established that all elements of a criminal offense must be included in an indictment charging a violation of that offense. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). An indictment is sufficient under the Fifth Amendment if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and * * * enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." 418 U.S. at 117. It is equally well established that due process requires that all elements of a criminal offense be proven beyond a reasonable doubt to support a conviction. *In re Winship*, 397 U.S. 358, 364 (1970).

There is no constitutional mandate that such procedures and standards be met, however, for factors that bear only on the defendant's sentence. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 84-86 (1986). Sentencing factors that are not elements of the underlying criminal offense need not be pleaded or proven at trial. *Ibid.* Therefore, in order to determine whether a factor must be charged and proven at trial, it must be determined whether the factor is an element of the offense or a sentencing factor. That determination depends on the intent of the legislature because "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S.

419, 424 (1985) and citing *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812)). While there are constitutional limits beyond which a legislature may not go, it is clear that the government need not include as elements and prove beyond a reasonable doubt all facts that bear on the severity of the criminal penalty. *McMillan*, 477 U.S. at 84, 85. The intent of Congress in its definition of the elements of a criminal offense is to be derived from the language, structure, and history of the statute. *United States* v. *Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997); *United States* v. *Wells*, 117 S. Ct. 921, 928 (1997); *Garrett* v. *United States*, 471 U.S. 773, 779 (1985).[2]

---

[2] Petitioner seems to suggest (Pet. Br. 20-26) that *Garrett* requires application of the four-factor test developed by the Fifth Circuit in *United States* v. *Davis*, 801 F.2d 754 (5th Cir. 1986), and that that test is dispositive. *Garrett* does not state a new test, as petitioner's amicus acknowledges. See Nat'l Association of Criminal Defense Lawyers Amicus Br. 28. The factors cited by *Davis* were simply features of one sentencing provision (fomer 18 U.S.C. 849) discussed by the *Garrett* Court as relevant to its textual and structural analysis of another provision (creating the continuing criminal enterprise offense). See 471 U.S. at 779-782. The Court did not describe those factors as a "test"; indeed, the *Garrett* Court characterized another provision (18 U.S.C. 848(a)(1)) as "contain[ing] language that is typical" of a recidivist provision, without applying a four-factor test. See 471 U.S. at 782. That latter provision is comparable to Section 1326, in that it enhances the authorized sentence of an offender who "engages" in prohibited conduct after having sustained prior convictions under the same section. 18 U.S.C. 848(a)(1) .

A. The Statutory Text and Structure Establish that Section 1326(b)(2) is a Penalty Enhancement Provision

1. a. The text of 8 U.S.C. 1326 reflects Congress's intent to define a single offense based on a deported alien's illegal reentry, and to vary the severity of the penalty according to the offender's criminal history before his deportation. Subsection (a) defines the elements of the offense by making it a crime for an alien to reenter the United States, after having been deported, without the prior consent of the Attorney General to reapply for admission. See 8 U.S.C. 1326(a). Subsection (a) further specifies that, "[s]ubject to subsection (b)," any alien who commits such offense "shall be fined under title 18, or imprisoned for not more than 2 years, or both." *Ibid.* Giving the words their ordinary meaning, the introductory clause, "[s]ubject to subsection (b)," conditions the severity of the penalty imposed under subsection (a) on any modification of the authorized penalty that is required by subsection (b). See *Webster's Third New International Dictionary* 2275 (1976) (entry 2, def. 4: defining "subject" to mean "likely to be conditioned, affected, or modified in some indicated way: having a contingent relation to something and usu. dependent on such relation for final form, validity, or significance"); *The Random House Dictionary of the English Language* 1893 (2d ed. 1987) (def. 20: defining "subject" to mean "being dependent or conditional upon something (usually fol. by *to*)"); *The American Heritage Dictionary of the English Language* 1788 (3d ed. 1992) (def. 4: defining "subject" to mean "[c]ontingent or dependent").

Subsection (b), 8 U.S.C. 1326(b), provides that, "[n]otwithstanding subsection (a)," in "the case of

any alien described in such subsection," *i.e.*, an alien who has committed the offense defined by subsection (a), specified punishments, greater than that authorized under subsection (a), are authorized for certain aliens who fall within one of the subsection (b) categories. Subsections (b)(1) and (b)(2) enhance the maximum penalty based on the alien's criminal history before deportation.[3] Giving the words their ordinary meaning, the phrase "[n]otwithstanding subsection (a)" authorizes imposition of the greater penalties specified in subsection (b) for a subset of aliens who violate subsection (a), in spite of the lesser penalty otherwise provided for in subsection (a). See *Webster's Third New International Dictionary* 1545 (1976) (entry 1: defining "notwithstanding" to mean "without prevention or obstruction from or by: in spite of"); *The Random House Dictionary of the English Language* 1326 (2d ed. 1987) (def. 1: defining "notwithstanding" to mean "in spite of; without being imposed or prevented by").

---

[3] Subsection (b)(1) raises the maximum term of an alien who was convicted of "three or more misdemeanors involving drugs, crimes against the person, or both," or was convicted of a "felony (other than an aggravated felony)," before his deportation to not more than ten years' imprisonment. 8 U.S.C. 1326(b)(1). Subsection (b)(2), the provision at issue here, raises the maximum term of an alien who was convicted of "an aggravated felony" before his deportation to not more than 20 years' imprisonment. 8 U.S.C. 1326(b)(2).

Subsections (b)(3) and (b)(4) were added in 1996. See Pub. L. No. 104-132, § 401(c), 110 Stat. 1267; Pub. L. No. 104-208, § 305(b), 110 Stat. 3009-606. They authorize certain punishments in cases where an alien was involved with terrorist activities or was serving a sentence for another criminal offense at the time of his deportation. See pp. 27, 29, *infra*.

Because the application of subsection (b) is predicated on a violation of subsection (a), subsection (b) does not define a separate offense. "[S]ubsection (b) cannot stand on its own as a separate offense without reference to subsection (a), as it 'clearly predicates punishment upon conviction of the underlying crime.'" *United States* v. *Haggerty*, 85 F.3d 403, 405 (8th Cir. 1996) (citation omitted); see also *United States* v. *Valdez*, 103 F.3d 95, 98 (10th Cir. 1996); *United States* v. *Vasquez-Olvera*, 999 F.2d 943, 946 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). Subsection (a) defines the crime of illegal reentry after a previous deportation by identifying the conduct involved in the offense. Subsection (b) does no more than single out subsets of persons who commit that crime for more severe punishment. "Clearly the 'notwithstanding' language refers to the less harsh penalties of subsection (a) and the 'subject to' clause allows the greater penalties of subsection (b) to apply where appropriate. This linguistic structure of section 1326 belies any imputation of Congressional intent to establish * * * separate offenses." *United States* v. *Campusano*, 906 F. Supp. 288, 290 (D.V.I. 1995). "It is highly unlikely that Congress would structure the statute in such a way that subsection (b) is dependent on elements of subsection (a), if it intended for subsection (b) to be a separate criminal offense." *Vasquez-Olvera*, 999 F.2d at 946; *United States* v. *Crawford*, 18 F.3d 1173, 1177 (4th Cir.), cert. denied, 513 U.S. 860 (1994).[4]

---

[4] The specification of an offense in one subsection of a statute followed by penalties in a second subsection is consistent with congressional practice in other criminal statutes. For example, the Second Circuit has observed that "Section 1326 is analogous to a frequently invoked narcotics-offense statute, 21 U.S.C. § 841." *United States* v. *Cole*, 32 F.3d 16, 18 (2d Cir.), cert. denied, 513 U.S. 993 (1994). That court viewed the relationship between subsections (a) and (b) of Section 1326 to be analogous to the relationship between subsections (a) and (b) of 21 U.S.C. 841, with (a) defining a criminal offense and (b) listing penalties for violating (a). 32 F.3d at 18-19. The court explained that, under Section 841(b), the sanctions become harsher depending not only on the type and quantity of controlled substances involved, but "[m]ore important for our analysis, each subdivision of subsection (b) provides a longer statutory maximum for defendants with prior convictions, just like the subdivisions [(1) and (2)] of 8 U.S.C. § 1326(b)." *Id.* at 19. It therefore concluded that, "[i]n the same manner that § 841(b) provides longer statutory maximums for certain narcotics offenders with prior convictions, § 1326(b) provides longer statutory maximums for certain deported aliens with prior convictions who reenter the United States." *Ibid.*

b. An examination of the text and structure of the 1988 amendment to Section 1326 that added subsection (b) also demonstrates that Congress did not intend that provision to define a separate substantive offense. Congress added subsection (b) through Section 7345 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4471. Congress entitled that section "Criminal Penalties For Reentry of Certain Deported Aliens." 102 Stat. 4471. The title corroborates the congressional intent reflected in the text of the statute, *i.e.*, that Section 1326(b) constitute a penalty provision for certain aliens (those with serious criminal histories predating deportation) who violate Section 1326(a). See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (title of

statute relevant when discerning meaning of statute).[5]

Moreover, the alterations made by the 1988 amendment to the structure of subsection (a) demonstrate that Congress intended subsection (b) to supply penalty enhancements for certain aliens who violate subsection (a). The amendment redesignated the then-existing version of Section 1326 (which had not been amended since enactment in 1952) as new subsection (a) and struck out the first two words, *i.e.* "Any alien," replacing them with "Subject to subsection (b), any alien." 102 Stat. 4471. If Congress had intended to create a new substantive offense through subsection (b), there would have been no reason to change the text of subsection (a). The text would have remained unaltered as a substantive matter, and subsection (b) would have been drafted in a parallel fashion to identify the elements of whatever new offense was intended. Instead, however, Congress maintained the same definition of the illegal reentry offense in Section 1326(a) for all aliens, with the

---

[5] Petitioner's attempt to discount the significance of the title chosen by Congress (Pet. Br. 25 n.19) by reliance on *Simpson* v. *United States*, 435 U.S. 6 (1978), is unpersuasive. The Court's conclusion in *Simpson* that Section 924(c) of Title 18 defined a substantive offense, despite the fact that it is contained in a section titled "penalties," was based on lower court opinions that had relied on the distinctive legislative history of Section 924(c) and the text and subject matter of the provision. See 435 U.S. at 10 & n.4 (citing *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir.), cert. denied, 414 U.S. 1070 (1973); *United States* v. *Sudduth*, 457 F.2d 1198 (10th Cir. 1972)). Moreover, petitioner elsewhere concedes (Pet. Br. 21 & n.15) that another provision in Section 924 entitled "penalties" (18 U.S.C. 924(e)) is "unmistakably intended to be [a] sentencing enhancement[]."

proviso in new subsection (b) that certain categories of violators are exposed to greater penalties based on their criminal histories before deportation.

2. The conclusion that Section 1326(b)(2) is a penalty enhancement provision, not a separate offense, is consistent not only with the text and structure of Section 1326 but also with the interpretation given it by the vast majority of courts of appeals. Of the ten circuits that have addressed the issue, all but one agree that Section 1326(b)(2) is a penalty provision.[6]

The lone conflicting circuit is the Ninth Circuit. See *United States* v. *Campos-Martinez*, 976 F.2d 589, 591-592 (9th Cir. 1992). That court relies on an unpersuasive analogy to Section 1325(a), which makes it unlawful for an alien to enter the United States through a means not authorized by immigration officials. Section 1325(a) provides, in relevant part, that "for the first commission of any such offense," the offender can be imprisoned not more than 6 months, and "for a subsequent commission of any such offense," not

---

[6] See *Valdez*, 103 F.3d at 97-98 (holding that subsection (b) is a penalty provision, not a separate offense); *Haggerty*, 85 F.3d at 405 (same); *United States* v. *DeLeon-Rodriguez*, 70 F.3d 764, 766 (3d Cir. 1995) (same), cert. denied, 116 S. Ct. 1343 (1996); *United States* v. *Palacios-Casquete*, 55 F.3d 557, 560 (11th Cir. 1995) (same), cert. denied, 116 S. Ct. 927 (1996); *United States* v. *Munoz-Cerna*, 47 F.3d 207, 210 n.6 (7th Cir. 1995) (same); *Cole*, 32 F.3d at 18 (same); *Crawford*, 18 F.3d at 1177 (same); *United States* v. *Forbes*, 16 F.3d 1294, 1298-1300 (1st Cir. 1994) (same); *Vasquez-Olvera*, 999 F.2d at 945-946 (same).

more than 2 years.[7] The Ninth Circuit interprets Section 1325(a) as defining two different offenses; the first offense is a misdemeanor while the second offense is a felony, and a prior conviction of the misdemeanor offense constitutes an element of the felony offense. *United States* v. *Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982). When the Ninth Circuit addressed Section 1326, it interpreted it in a similar fashion, without analysis, and held that Sections 1326(a), 1326(b)(1), and 1326(b)(2) each constitute separate criminal offenses. *United States* v. *Gonzalez-Medina*, 976 F.2d 570, 572 (1992); see also *United States* v. *Arias-Granados*, 941 F.2d 996, 998-999 (9th Cir. 1991). When that interpretation was challenged as inconsistent with the text, structure, and history of Section 1326, the Ninth Circuit adhered to its precedent and explicitly held that Section 1326 and Section 1325(a) were analogous in "structure, operation, purpose, and subject matter," and should be

---

[7] Section 275(a) of the INA, 8 U.S.C. 1325(a), provides:

§ 1325. Improper entry by alien

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

treated the same. *Campos-Martinez*, 976 F.2d at 591-592.

It is by no means established, however, that the provision in Section 1325(a) that provides enhanced punishment for a second offense defines a separate offense and is not simply a sentence enhancement provision. See, *e.g.*, *Vasquez-Olvera*, 999 F.2d at 947 n.8 ("[i]n our view, section 1325(a) has many of the common attributes of a sentence enhancement provision and should be interpreted as a sentence enhancement provision"); *Crawford*, 18 F.3d at 1178 ("the prior conviction in a § 1325 offense is, in our view, a sentence enhancement provision, rather than a separate criminal offense because both of the penalty provisions of § 1325 apply to any 'such offense' committed under that section").[8]

Moreover, even if Section 1325(a) were correctly interpreted to define more than one substantive offense, that construction would not carry over to Section 1326. The language and structure of Section 1326 does not duplicate or parallel that of Section 1325(a). Section 1326(b) alters the potential maximum term of imprisonment for a felony offense; the provision in Section 1325(a) that alters the punishment

---

[8] Petitioner's amicus states that the government has conceded that Section 1325(a) defines "two separate offenses distinguished by a prior conviction," apparently relying on the statement in the *Campos-Martinez* opinion to that effect. See Nat'l Ass'n of Criminal Defense Lawyers Amicus Br. 12. Contrary to the implication of the statement in that opinion, however, the government did not make such a concession in that case. The government merely argued that, in construing Section 1326(b), the court should not rely on Section 1325 as an analogous statute. Gov't C.A. Br. at 10, *United States* v. *Campos-Martinez*, No. 91-50756 (9th Cir.).

also changes the nature of the conviction from a misdemeanor to a felony. Thus, "a prior conviction under section 1325(a) subjects a defendant to more than a simple sentence enhancement; instead, it subjects that defendant to an entirely different class of offense, a felony." *Vasquez-Olvera*, 999 F.2d at 947. The difference between the two provisions has led several courts to conclude that they were not intended to be interpreted in an identical fashion. *Id.* at 946 ("the two sections are too different for Congress to have intended for them to be interpreted similarly"); *Valdez*, 103 F.3d at 98 (Sections 1325 and 1326 "are too dissimilar to compel identical readings"); see also *Crawford*, 18 F.3d at 1178 (disagreeing with Ninth Circuit reliance on analogy to Section 1325); *Haggerty*, 85 F.3d at 405; *DeLeon-Rodriguez*, 70 F.3d at 766-767. Rather, Section 1326 must be interpreted in light of that provision's own distinctive text and background.[9]

---

[9] Contrary to petitioner's assertion (Pet. Br. 11-12), the courts of appeals have not applied widely varying analyses in finding that Section 1326(b) is a penalty provision. Generally, they have relied on the language, structure, and legislative history. The Fifth Circuit's application of the *Davis* test (see note 2, *supra*) did not represent a wholly "alternative analysis," as petitioner asserts (Pet. Br. 20). Consideration of the *Davis* factors necessarily includes analysis of the structure and language of the statute, as petitioner concedes (Pet. Br. 11). See *Vasquez-Olvera*, 999 F.2d at 945-946. Only one court of appeals has found the language and structure of Section 1326 not dispositive in discerning congressional intent, and concluded that Section 1326(b)(2) should be read as a sentence enhancement provision because of policy concerns and precedent construing similarly structured statutes. *Forbes*, 16 F.3d at 1298-1300. That court did not have before it the legislative history discussed below. See *id.* at 1298.

B. The Legislative History Supports the Conclusion that Section 1326(b)(2) is a Penalty Enhancement Provision

1. As explained above, Section 1326(b)(2) was explicitly labeled a "penalty" when it was enacted in 1988. The legislative history surrounding that enactment also points unambiguously to the conclusion that Section 1326(b)(2) was intended as a sentence enhancement provision and not a new, substantive offense.

Legislation to authorize longer terms of imprisonment for aggravated felons who violate Section 1326 was introduced by Senator Chiles in 1987. See S. 973, 100th Cong., 1st. Sess.; 133 Cong. Rec. 8771-8773. That bill contained language substantially similar to the language ultimately enacted as Section 7345 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, adding subsection (b) to Section 276 of the INA, 8 U.S.C. 1326. See 133 Cong. Rec. 8772-8773 (1987). The bill was entitled "A bill to provide for additional criminal penalties for deported aliens who reenter the United States, and for other purposes." *Id.* at 8771. Senator Chiles explained that the bill "would impose stricter criminal penalties upon aliens who reenter the United States after having been deported." *Id.* at 8772. He specified that it would "provide for a three-tier penalty system for [deported] aliens who reenter with mandatory sentences for aggravated felons." *Ibid.*[10] He described the imprisonment terms for the

---

[10] Senator Chiles' bill differed in substance from the legislation ultimately enacted in 1988 only in that his bill would have provided for a mandatory minimum sentence of 15 years' imprisonment (rather than authorizing a 15-year maximum term) for aggravated felons who violate Section 1326. 133 Cong. Rec. 8773 (1987).

three tiers as follows "first tier: any deported alien who reenters: up to 2 years * * *; second tier: any deported alien (nonaggravated felon) who reenters: up to 5 years * * *; and third tier: any deported alien (aggravated felon) who reenters: mandatory 15 years." *Ibid.*

A corresponding bill was introduced in 1987 by Representative Smith in the House of Representatives. See H.R. 3530, 100th Cong., 1st. Sess.; 133 Cong. Rec. 28,840-28,841. Representative Smith described the bill in the same manner, specifying the three-tier penalty structure. 133 Cong. Rec. 28,840-28,841.

During the next session of Congress, an identical proposal that would amend Section 1326 was introduced as Section 2918 of the Senate's omnibus anti-drug bill. S. 2852, 100th Cong., 2d Sess. § 2918 (1988); see 134 Cong. Rec. 27,505 (1988) (text of Section 2918). That section was titled "Criminal Penalties for Reentry of Certain Deported Aliens." 134 Cong. Rec. 27,505 (1988). The section-by-section analysis presented to the full Senate described the proposed amendment as a penalty provision:

> Section 2918.—Increases current penalty for illegal re-entry after deportation from up to 2 years imprisonment or up to $1000 fine to:
>
> Up to 5 years imprisonment and/or up to $10,000 for deported alien felons (other than aggravated alien felons).
>
> At least 15 years imprisonment and up to $20,000 fine for deported aggravated alien felons.

134 Cong. Rec. 27,429 (1988). Various sponsors of the Senate bill described the bill similarly, explaining that it "increases current penalties for illegal reentry after deportation," *id.* at 27,445 (remarks of Sen. D'Amato), and would "impose stiff penalties" against deported aliens convicted of drug offenses who attempt to reenter the United States, *id.* at 27,462 (remarks of Sen. Chiles). The provision was amended (to change the authorized sentence for aggravated felons from a proposed mandatory minimum of 15 years' imprisonment to a maximum of 15 years' imprisonment) and included as Section 7345 in the House amendment to the Senate amendment to H.R. 5210, 100th Cong., 2d Sess. (1988) (the House omnibus anti-drug bill). See 134 Cong. Rec. 33,238 (1988). It was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7345(a), 102 Stat. 4471. See 134 Cong. Rec. 33,238 (1988).[11]

The circumstances surrounding enactment of Section 1326(b)(2) thus provide every indication that Congress intended it to authorize increased penalties for certain Section 1326(a) offenders, not to constitute a free-standing offense. The history repeatedly refers to the new subsections as establishing "increased penalties." And the characterization of the proposed amendments as forming a three-tier penalty system is inconsistent with interpreting Section 1326(b) to define a new substantive offense.

2. Petitioner errs in contending (Pet. Br. 14-18) that the subsequent amendments to Section 1326 justify interpreting Section 1326(b)(2) to define a substantive criminal offense, rather than as a penalty provision. None of the subsequent amendments to Section 1326 undermines the conclusion that Section

---

[11] No Senate or House report was submitted with the final legislation.

1326(b)(2) is a penalty provision. Rather, they reinforce that conclusion.

a. In 1990, Congress amended 8 U.S.C. 1326(a) (1988), in one minor respect, to update the penalty provision that had remained the same since enactment in 1952. See Immigration Act of 1990 (1990 Act), Pub. L. No. 101-649, § 543(b)(3), 104 Stat. 5059; see also App., *infra*, 4a-5a. As petitioner notes (Pet. Br. 16), the amendment made the penalty provision in subsection (a) (authorizing a fine and imprisonment of no more than two years) parallel to subsections (b)(1) and (b)(2), by altering the fine authorization to refer to Title 18[12] and by simplifying the statement of the authorized imprisonment term.

Contrary to petitioner's contention (Pet. Br. 16), the amendment did not evidence any intent on the part of Congress to treat subsections (a), (b)(1), and (b)(2) each as a separate substantive offense. Rather, the amendment was one in a series of amendments updating the phraseology of various penalty provisions in the INA. Before the 1990 amendment, the penalty provision in subsection (a) had identified the offense as a felony and stated that "upon conviction thereof" the defendant would be fined up to a specified maximum amount. 8 U.S.C. 1326 (1988). When that provision was simplified by the 1990 amendment, several other provisions of the INA that had been similarly worded were simultaneously amended in an analogous manner—to eliminate the superfluous wording and to

[12] The amendment thereby increased the level of the criminal fine authorized according to provisions of the criminal code that had been enacted in 1984 and were generally applicable to fines imposed in most felony offenses (including 8 U.S.C. 1326). Pub. L. No. 98-473, 98 Stat. 1995 (Oct. 12, 1984); 18 U.S.C. 3571.

add references to the fine provisions of Title 18. See 1990 Act § 543(b)(1) (amending Section 252(c) of the INA (8 U.S.C. 1282(c) (1988)); § 543(b)(2) (C) (amending Section 275 of the INA (8 U.S.C. 1325 (1988)); § 543(b)(4) (amending Section 277 of the INA (8 U.S.C. 1327) (1988)); § 543(b)(5) (amending Section 278 of the INA (8 U.S.C. 1328) (1988)).

Petitioner identifies nothing in the legislative history of the 1990 amendment to suggest that Congress intended anything other than to update the various fine provisions. In fact, such a suggestion would be defeated by the titles used by Congress in the sections of the 1990 Act that contained the amendment—Section 543 is titled "Increase in Fine Levels: Authority of the INS to Collect Fines," and subsection (b) is titled "Criminal Fine Levels." 1990 Act § 543(b), 104 Stat. 5057, 5059.

b. In 1994, Congress amended 8 U.S.C. 1326 (1988 & Supp. II 1990) in three respects, thus producing the version applicable to petitioner's offense. None of those amendments alter subsection (b)(2)'s character as a penalty provision. See App., *infra*, 6a-7a. First, Congress amended the penalty provision in subsection (b)(1) that previously applied to aliens who had been convicted of a nonaggravated felony before deportation to extend its coverage to aliens who had been convicted of "three or more misdemeanors involving drugs, crimes against the person, or both." Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Act), Pub. L. No. 103-322, Tit. XIII, § 130001(b)(1)(A), 108 Stat. 2023. Congress thereby determined that aliens who violate Section 1326 after having suffered three such misdemeanor convictions before deportation should be treated the same for sentencing purposes as aliens who had nonaggravated

felony convictions. Under petitioner's reasoning, however, that amendment would have created yet another substantive offense in Section 1326, an element of which would be the existence of three previous misdemeanor convictions for the listed offenses. But it is clear that that was not Congress's intention. The title of the section containing the amendment states, in relevant part, "Enhancement of Penalties For * * * Reentering, After Final Order of Deportation." 1994 Crime Act § 130001, 108 Stat. 2023.

Second, Congress increased the maximum terms of imprisonment authorized by subsection (b)(1) to ten years (applicable to cases involving aliens with nonaggravated felony convictions and three serious misdemeanor convictions), and authorized by subsection (b)(2) to 20 years (applicable to cases involving aliens with aggravated felony convictions). 1994 Crime Act § 130001(b)(1)(B) and (b)(2), 108 Stat. 2023. Third, Congress added a sentence to Section 1326(b) that defines "deportation" for purposes of subsection (b) to include stipulated agreements during criminal trials. 1994 Crime Act § 130001(b)(3), 108 Stat. 2023. None of those changes in the statute altered the character of Section 1326(b)(2) as a penalty provision.

c. In 1996, Congress amended Section 1326 on two different occasions. First, as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Congress added subsections (b)(3), (c), and (d) to 8 U.S.C. 1326. App., *infra*, 8a-10a. Petitioner contends (Pet. Br. 17, 18) that subsections (b)(3) and (d) support his

interpretation of subsection (b)(2) as a separate offense.[13]

Subsection (b)(3) (added by AEDPA § 401(c), 110 Stat. 1267) mandates a nonconcurrent ten-year term of imprisonment in the case of an alien who violates Section 1326(a) by reentering without the Attorney General's permission if his previous exclusion or removal (Congress's new term for "deportation") was pursuant to 8 U.S.C. 1225(c) relating to terrorist activities (see 8 U.S.C. 1182(a)(3)(B)), or was pursuant to certain alien terrorist removal procedures (see AEDPA § 401(a), 110 Stat. 1258-1268 (adding new Sections 501-507 to INA)). Subsection (b)(3) is not "clearly" a new offense, "separate from those in subsection (a)," as petitioner claims (Pet. Br. 17). Congress entitled the subsection of AEDPA that added subsection (b)(3) to the INA as "Criminal Penalty for Reentry of Alien Terrorists." AEDPA § 401(c), 110 Stat. 1267. Petitioner cites no legislative

---

[13] Petitioner does not discuss subsection (c), which provides that any outstanding portion of a criminal sentence that an alien was serving at the time of his removal must be served by the alien if he reenters without the consent of the Attorney General. See AEDPA § 438(b), 110 Stat. 1276 (citing former Section 242(h)(2) of the INA (8 U.S.C. 1252(h)(2)), as added by AEDPA, which authorized such removals in cases of nonviolent offenders). Subsection (c) also states that service of the remainder of that sentence cannot be reduced for parole or supervised release and that the alien "shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law." *Ibid.* Congress's reference to "other penalties relating to the reentry of deported aliens as may be available under this section" reflects Congress's view of reentry of deported aliens as a single criminal offense, with more than one penalty available under Section 1326 for those who commit that offense.

history or other authority to support his claim that it creates a new substantive offense, and is not merely a sentencing provision.

Subsection (d) (added by AEDPA, § 441(a), 110 Stat. 1279) restricts the ability of an alien to bring a collateral attack against an underlying deportation order in a criminal proceeding under Section 1326. Petitioner contends that his interpretation of Section 1326(b)(2) as a separate offense is supported by subsection (d)'s reference to "the deportation order described in subsection (a)(1) or subsection (b) of this section." He asserts that, if subsection (b) contained only sentence enhancements for offenses described in subsection (a), there would have been no need for Congress to refer "to both (a) and (b)" in Section 1326(d). Pet. Br. 18 (emphasis omitted).

Petitioner reads too much into the cross-reference contained in subsection (d). The reference is naturally read as an effort to ensure that all deportation orders that might be at issue in a criminal prosecution under Section 1326 would be covered. Petitioner points to nothing in the legislative history or elsewhere to suggest otherwise. Petitioner, in fact, states (Pet. Br. 18) that the reference in subsection (d) to a "deportation order described in * * * subsection (b)" cannot be given a precise meaning because the text of subsection (b) does not contain the phrase "deportation order" or contain any description thereof.

d. Congress's second set of amendments to Section 1326 in 1996 were included as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, 110 Stat. 3009-575. Congress thereby amended subsection (a), added subsection (b)(4) to Section 1326 and

directed the United States Sentencing Commission to take certain action regarding Section 1326. See IIRIRA §§ 305(b), 308(d)(4)(J)(i), 334, 110 Stat. 3009-606, 3009-618, 3009-635; see also App., *infra* 11a-14a.[14] Petitioner contends (Pet. Br. 17-19) that subsection (b)(4) and Congress's direction to the Commission support his interpretation of subsection (b)(2) as a separate offense.

Subsection (b)(4) (added by IIRIRA § 305(b), 110 Stat. 3009-606 to 3009-607), provides that, in the case of an alien who was serving a term of imprisonment at the time of his removal, and was removed before completion of that term (pursuant to procedures that permit such removal in cases of certain nonviolent offenders (see 8 U.S.C.A. 1231(a)(4)(B)), and reentered without the Attorney General's permission, the alien "shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both." Congress thereby ensured that aliens who violate Section 1326(a) after having been relieved of service of part of a criminal sentence (albeit for a nonviolent offense) before deportation shall not be limited to a two-year maximum term of imprisonment. The sentence authorized under subsection (b)(4) is in addition to completion of the unfinished predecessor sentence as required by subsection (c).

Subsection (b)(4) is not "clearly" a new offense, "separate from those in subsection (a)," as petitioner

---

[14] Various other changes to Section 1326 made through IIRIRA, including conforming amendments that adopted the new terminology of the INA, substituting the term "removal" for the terms "deportation" and "exclusion," did not affect the substance of the provisions at issue here. See IIRIRA §§ 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 110 Stat. 3009-618, 3009-619, 3009-620.

claims (Pet. Br. 17). It is true that certain features do make subsection (b)(4) more susceptible to such an interpretation than subsection (b)(2). Unlike the provision in the 1988 Act that added subsection (b)(2), the provision in IIRIRA that added subsection (b)(4) does not identify the new subsection as a penalty; and unlike subsection (b)(2), subsection (b)(4) restates certain elements of the offense defined in subsection (a). But those features of subsection (b)(4)—absent from subsection (b)(2)—do not support petitioner's contention that subsection (b)(2) must be construed to define a substantive criminal offense apart from that defined in subsection (a). To the contrary, the textual differences between subsections (b)(2) and (b)(4) reinforce the conclusion that subsection (b)(2) does not define a separate offense.

Petitioner overlooks the other substantive amendment to Section 1326 effected by IIRIRA. Congress amended subsection (a) to extend it to aliens who "departed the United States while an order of exclusion or deportation is outstanding." IIRIRA § 324(a), 110 Stat. 3009-629.[15] Congress thereby ensured that aliens who were previously ordered deported or excluded, but who evaded official enforcement of that order by departing from the United States on their own, also commit a violation of Section 1326(a) if they reenter without first obtaining the Attorney General's consent to reapply for admission. By adding that provision to subsection (a), Congress made clear that the offense conduct in Section 1326 is defined by

[15] The appendix to petitioner's brief erroneously includes this language, which was added by IIRIRA, in the version of Section 1326 that purports to contain only the changes effected through AEDPA. See Pet. Br. App. B8.

that Section 1326 subsection, not by the penalty enhancement provisions found in subsection (b)(2).

Petitioner places great weight on a provision of IIRIRA that directs the United States Sentencing Commission to promulgate "amendments to the sentencing guidelines to make appropriate increases in the base offense level for offenses under section 242(e) and 276(b) of the Immigration and Nationality Act (8 U.S.C. 1252(e), 1326(b)) to reflect the amendments made by section 130001 of the Violent Crime Control and Law Enforcement Act of 1994." IIRIRA § 334, 110 Stat. 3009-635. Petitioner contends (Pet. Br. 19) that, by cross-referencing to "offenses under section * * * 1326(b)," Congress evidenced an understanding that the provisions of subsection (b) enacted six years earlier be interpreted as separate crimes with elements different from the offense defined in subsection (a), rather than as penalty provisions.

At the time of Congress's directive to the Commission, the Sentencing Guidelines had not been amended to take account of Congress's expansion, in 1994, of the class of offenders subject to punishment under subsection 1326(b)(1).[16] The directive to the Commis-

[16] The relevant Sentencing Guideline applicable at the time of the enactment IIRIRA in 1996 had been unchanged in relevant part since November 1, 1991. U.S.S.G. § 2L1.2. Although the Guideline provided for a 16-level increase in the offense level where the defendant had been deported following an aggravated felony, and for a 4-level increase where the defendant had been deported following a non-aggravated felony, it did not provide for any offense level increase for defendants who had been deported following conviction of three misdemeanors involving drugs or crimes against the person—the class of offender that Congress had made subject to increased punishment in 1994.

sion was intended to eliminate the discrepancy between the class of Section 1326 offenders subject to enhanced punishment under the statute as amended in 1994, and the class subject to enhancement under the outdated Guidelines provision that did not take account of the 1994 statutory amendment. Although petitioner is correct that the directive cross-references only subsection (b), and not Section 1326 or subsection (a), that does not mean that Congress perceived subsection (b) to be a separate, substantive offense. The 1994 statutory amendment that was the basis for Congress's directive amended only subsection (b), not subsection (a). See 1994 Crime Act § 130001, 108 Stat. 2023. Therefore, it was natural for Congress to cross-reference only that subsection in its directive.

Moreover, a different cross-reference in IIRIRA clearly identifies subsection (b) as a penalty provision and subsection (a) as the substantive offense, the violation of which triggers application of enhanced penalties under subsection (b). In Section 321(c) of IIRIRA, Congress established the effective date for its contemporaneous amendments to the definition of "aggravated felony" for purposes of the INA. 110 Stat. 3009-628. Congress generally provided that the amendments would apply "to actions taken on or after the date of the enactment of [IIRIRA], regardless of when the conviction occurred," but then specified that the amendments "shall apply *under section 276(b)* of the [INA] only to *violations of section 276(a)* of such Act occurring on or after such date." *Ibid.* (emphasis added). The most reasonable interpretation of that provision is that if an alien violates Section 276(a) (8 U.S.C. 1326(a)), the penalties of Section 276(b) (8 U.S.C. 1326(b)) apply to his case, although the particular version of the penalties that applies (*i.e.* the version based on former definition of aggravated felony, or version based on new, expanded definition of aggravated felony) depends on whether the violation of Section 1326(a) occurred before or after the date IIRIRA was enacted. If Congress had understood subsection (b) to define a separate, substantive offense, rather than to provide enhanced penalties, it would not have referred to "violations of section [1326](a)."

C. The Rule of Lenity Does Not Require Adoption of Petitioner's Statutory Interpretation

The rule of lenity is a maxim of statutory construction that applies only in cases "where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Staples*, 511 U.S. at 619 n.17 (citations and internal quotation marks omitted). Lenity is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980); see also *Wells*, 117 S. Ct. at 931 ("The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended.") (internal quotation marks omitted). As demonstrated above, examination of the text, structure, and history of Section 1326 provides sufficient guidance to reveal Congress's intent to make subsection (b) a penalty enhancement provision.

Moreover, the statute in this case does not implicate the principal purpose of the rule of lenity, *i.e.* to ensure that criminal statutes will provide "fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. The scope of the conduct prohibited by Section 1326 and the potential punishment authorized for particular violations are clear. Cf. *Bifulco*, 447 U.S. at 387 (recognizing that the rule has been applied to resolve questions regarding the substantive scope of criminal statutes and whether a sentence has been authorized by law). There is no ambiguity about the effect of Section 1326(b)(2): any alien who violates Section 1326(a), and who was convicted of an aggravated felony before his deportation, is subject to a maximum term of imprisonment of 20 years. Whether the prior criminal conviction is to be proven at sentencing, or during trial, the statute gives a defendant explicit warning of the illegality of his conduct and of the potential penalty attached to that violation of law.

In any event, even if it were ambiguous whether subsection (b) provided only for penalty enhancement, it is not clear that petitioner's interpretation would be required by the rule of lenity. Application of that rule requires adoption of the "less harsh meaning." *Ladner* v. *United States*, 358 U.S. 169, 177 (1958). But petitioner's interpretation may well be harsher as a general matter than the government's interpretation because of the possible prejudice to a defendant when his prior conviction is disclosed at trial. Cf. *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967) (upholding recidivist scheme where prior crime was alleged in indictment and revealed to the jury, but noting potential for prejudice from that procedure). The First Circuit has emphasized that the introduction of prior crimes

evidence at trial may be "especially prejudicial where, as here, the underlying crime (unlawful reentry following deportation) might not be viewed by the jury as particularly egregious." *Forbes*, 16 F.3d at 1300. That court also noted the "strong Congressional policy of avoiding introduction of this type of potentially prejudicial evidence in criminal trials," *id.* at 1299, and decided that "[i]n the absence of Congressional direction, we are reluctant to impose that burden on defendants," *id.* at 1300; see also *United States* v. *Lowe*, 860 F.2d 1370, 1376-1377 n. 9 (7th Cir. 1988) (recognizing that the potential prejudice in including a defendant's felony record in the indictment, and in presenting that type of evidence at trial, bears on the application of the rule of lenity), cert. denied, 490 U.S. 1005 (1989). As the court noted in *Forbes*, while a particular Section 1326 defendant who was indicted only under subsection (a) would be benefited by treating subsection (b) as a separate offense, future defendants would likely "have more to lose than gain from th[at] interpretation." 16 F.3d at 1300.[17]

---

[17] There is no merit to petitioner's suggestion (Pet. Br. 43-45) that the Court exercise its supervisory power to require that prior convictions that increase a maximum punishment be treated as an element of the offense regardless of congressional intent. Supervisory authority does not justify overriding Congress's definition of the elements of criminal offenses. See *Staples*, 511 U.S. at 604 ("[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute") (quoting *Liparota*, 471 U.S. at 424).

D. Section 1326(b)(2)'s Authorization of Enhanced Maximum Terms of Imprisonment Based on a Sentencing Factor is Constitutional

Petitioner contends (Pet. Br. 28-29) that the Court should decline to interpret Section 1326(b)(2) as a sentencing enhancement provision because (in his view) that interpretation raises serious constitutional problems. He bases that contention on the premise that the Constitution mandates that his prior aggravated felony be alleged in an indictment and proven by a reasonable doubt because it serves to increase the maximum authorized sentence for his offense. See Pet. Br. 30-47.[18] Petitioner's premise is flawed.

Legislatures have wide discretion in identifying which facts must be proven to establish a crime and which facts are relevant only to the sentence.[19] The

---

[18] Petitioner also contends (Pet. Br. 30-33) that sentencing enhancements increasing the maximum potential penalty are unconstitutional because applicability of various procedural rights, such as the right to trial by jury and the federal felony defendant's right to indictment by a grand jury, turns on the severity of the maximum authorized penalty. Where the underlying offense is a felony, however, as here, those rights are in any event applicable. This is not a case in which a sentencing enhancement increases the punishment in a manner that changes the nature of the offense and attendant procedural rights, *e.g.*, by changing the offense from a misdemeanor to a felony. See Pet. Br. 48 n.24 (discussing statutes that contain both misdemeanor and felony provisions).

[19] For example, the Court's decisions regarding capital sentencing schemes have made clear that factors that make a defendant eligible for a more serious penalty need not be elements of the underlying substantive offense and, thus, need not be charged or proven at trial. See *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (Sixth Amendment permits imposition of the death penalty based on judge's finding of aggravating circumstance that qualifies defendant for death sentence, because the aggravating circumstance is not an element of offense that must be determined by jury); *Spaziano* v. *Florida*, 468 U.S. 447 (1984) (Sixth Amendment does not require a jury trial on the sentencing issue of life or death and does not invalidate state scheme that permits trial judge to impose death sentence notwithstanding jury's recommendation of a sentence of life imprisonment); *Walton* v. *Arizona*, 497 U.S. 639 (1990) (holding that aggravating factors that qualify defendant for the death sentence need not be denominated by the State as elements of the offense, and rejecting capital defendant's argument that every finding of fact underlying a death sentence must be made by a jury).

Court has expressly "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *McMillan*, 477 U.S. at 84 (citing *Patterson*, 432 U.S. at 214). And "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan*, 477 U.S. at 85 (citing *Patterson*, 432 U.S. at 210).[20]

---

[20] Petitioner's reliance (Pet. Br. 41-42) on *Specht* v. *Patterson*, 386 U.S. 605 (1967), is misplaced. *Specht* did not address the issue whether a legislature could provide for penalty enhancement factors to be established at sentencing, rather than at trial as elements of the offense. As the *McMillan* Court noted, *Specht* involved "a radically different situation" from the ordinary sentencing proceeding. *McMillan*, 477 U.S. at 89. Under the Colorado scheme at issue in *Specht*, conviction of a sexual offense otherwise carrying a maximum penalty of ten years exposed a defendant to an indefinite term, to and including life imprisonment, if the sentencing judge made a post-trial finding that the defendant posed "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." 386 U.S. at 607. That finding could be made, without notice or any "hearing in the

While "there are obviously constitutional limits" on the legislature's power to define the elements of an offense, *McMillan*, 477 U.S. at 85, there is no basis for petitioner's argument that the legislature must include in the definition of an offense the fact of a prior conviction if it increases the maximum sentence authorized for the offense. A defendant's prior criminal history is a traditional sentencing factor that may constitutionally be treated as a basis for imposing an enhanced penalty. See *McMillan*, 477 U.S. at 89. In this case, as in *McMillan*, the legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment" (*ibid.*) and prescribed an effect for that factor. It is particularly

---

normal sense," based solely on a presentence psychiatric report. *Id.* at 608. The Court held that the Colorado scheme failed to satisfy the requirements of due process, and that the defendant had a right to counsel, notice, an opportunity to be heard, to cross-examine the witnesses against him, and to offer evidence of his own. *Specht* did not hold that the Constitution required that the facts supporting the enhancement be included as an element of the offense and proved to the jury beyond a reasonable doubt.

Addington v. *Texas*, 441 U.S. 418 (1979), is similarly irrelevant here (see Pet. Br. 32-33, 44-45), because that case involved the standard of proof for involuntary commitment to a mental institution, not criminal sentencing. The Court has rejected the argument that *Addington* requires application of the "clear and convincing" standard of proof in a criminal sentencing. *McMillan*, 477 U.S. at 92 n.8; see also *Parke* v. *Raley*, 506 U.S. 20, 28-34 (1992) (upholding against due process challenge a State's rule that imposes burden of production on defendant, in sentencing proceeding, to rebut presumption of the validity of prior conviction used for sentence enhancement); *id.* at 34-35 (rejecting argument that Constitution compels that prior conviction used to enhance punishment be proven by clear and convincing evidence).

appropriate for Congress to make an illegal-reentry defendant's commission of crimes before his deportation relevant to the authorized length of his sentence. By reentering this country illegally despite a prior deportation, an alien has manifested his willingness to repeat his violation of our laws. When an alien has, in addition, a record of criminal behavior during his prior stay here, a sentencing court may believe that a longer term of imprisonment is justified to incapacitate the offender and to send a stronger deterrent message. "The congressional codification of traditional sentencing factors does not transform 'a sentencing factor into an 'element' of some hypothetical 'offense.'" *United States* v. *Brewer*, 853 F.2d 1319, 1326 (6th Cir.) (quoting *McMillan*, 477 U.S. at 90), cert. denied, 488 U.S. 946 (1988).[21]

Petitioner attempts to distinguish *McMillan* (Pet. Br. 45-47) because the statute there enhanced only the mandatory minimum sentence and did not alter the maximum penalty authorized for the offense. The *McMillan* opinion, however, did not adopt the distinction petitioner suggests. In rejecting the *McMillan* defendants' argument that the sentencing enhance-

---

[21] The Court noted in *McMillan* that the courts of appeals had "uniformly rejected due process challenges to the preponderance standard under the federal 'dangerous special offender' statute, 18 U.S.C. § 3575 (repealed), which provides for an enhanced sentence if the court concludes that the defendant is both 'dangerous' and a 'special offender [*i.e.* had been convicted of specified criminal offenses that yielded imprisonment terms]." 477 U.S. at 92-93 (citing *United States* v. *Davis*, 710 F.2d 104, 106 (3d Cir.), cert. denied, 464 U.S. 1001 (1983)). That statute authorized a maximum term of imprisonment up to 25 years, which constituted an increase in the maximum penalty authorized under many federal statutes. See *Davis*, 710 F.2d at 105.

ment factor at issue (visible possession of a firearm) must be proven beyond a reasonable doubt because it was "'really' an element of the offenses for which they [were] being punished," the Court merely commented that the defendants' argument would have had "at least more superficial appeal" if a finding of that factor "exposed them to greater or additional punishment." 477 U.S. at 88. It did not state that the outcome of the case would have been different in such circumstances.[2]

Petitioner also relies on a series of cases predating *McMillan* that petitioner characterizes as evidencing a "traditional rule," the common law, and state and federal practice, requiring that a prior conviction that increased a maximum sentence be alleged in an indictment and proven beyond a reasonable doubt. See Pet. Br. 30, 33-39, 44. Many of the cases cited by petitioner concern due process notice requirements that are not at issue here, or statutory requirements that the prior conviction be proven as an element of the offense. See, *e.g.*, *Massey* v. *United States*, 281 F. 293, 297-298 (8th Cir. 1922); *Singer* v. *United States*, 278 F. 415, 419-420 (3d Cir.), cert. denied, 258 U.S. 620 (1922). In any event, the Court has made clear that whatever the practice might have been in some jurisdictions to proceed by indictment and proof beyond a reasonable doubt in recidivist cases, that practice is not mandated by the Constitution.

In *Graham* v. *West Virginia*, 224 U.S. 616 (1912), the Court rejected a criminal defendant's constitutional challenge to the sentence of life imprisonment that had been imposed pursuant to a state recidivist sentencing procedure that followed his conviction on grand larceny charges. The life sentence supplanted an original sentence of five years' imprisonment imposed upon his plea of guilty. 224 U.S. at 621. The life sentence was mandated under state law in cases involving offenders, like the defendant in question, who had been convicted twice before of offenses that yielded terms of confinement in a penitentiary. *Id.* at 621-622.

The defendant in *Graham* claimed that his sentence was imposed in violation of various constitutional guarantees, including his right to due process, because the punishment was imposed in a proceeding where the defendant "was not held to answer for an offense" and that was "clearly not for the establishment of guilt." 224 U.S. at 624-625 (citation to lower court opinion omitted). The defendant was merely accorded the opportunity to contest his identity before a jury. In a unanimous opinion for the Court rejecting petitioner's claim, Justice Hughes wrote:

> It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination.

---

[2] In fact, the Court noted that, "[b]y prescribing a mandatory minimum sentence," the statute in question "incidentally serves to restrict the sentencing court's discretion in setting a maximum sentence." 477 U.S. at 88 n.4.

Id. at 625. The Court emphasized that it was irrelevant whether the defendant's former convictions were known at the time of his indictment and trial on the underlying substantive offense. It explained that

> [a]lthough the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt and thereupon for the imposition of the full sentence prescribed, *there is no constitutional mandate* which requires the State to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. *This conclusion necessarily follows from the distinct nature of the issue and from the fact, so frequently stated, that it does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided.*

Id. at 629 (emphasis added); see also *id.* at 625-627 (discussing fact that "[i]t was established by statute in England," that prior conviction was alleged in indictment and not presented to jury until after verdict of guilty, but explaining that government may also proceed in a later proceeding based on an information to ascertain the defendant's identity, because in both situations "the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty may be fully protected").[23]

---

[23] The Court's ruling in *Graham* that the State need not allege the prior convictions in an indictment was not based on the inapplicability of the right to indictment by a grand jury to the States. See *Hurtado* v. *California*, 110 U.S. 516, 538 (1884). The basis for the Court's ruling that an indictment was not necessary was its conclusion that "[t]here is no occasion for an indictment * * * [because] the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction." *Graham*, 224 U.S. at 627.

In a later case involving the same statute, the Court made clear that its reasoning applied to instances where the penalty provision increased the maximum term of imprisonment. In *Oyler* v. *Boles*, 368 U.S. 448, 449-451 (1962), one defendant had been convicted of an offense that carried a maximum penalty of 18 years' imprisonment and the other defendant had been convicted of an offense that carried a maximum penalty of ten years' imprisonment. After conviction and before sentence, both of them were informed that they were subject to the same state recidivist law because they had suffered two prior convictions for offenses punishable by confinement in the penitentiary. 368 U.S. at 450-451. Application of that recidivist law did not merely increase the authorized maximum sentence, as is the effect of Section 1326(b); the state recidivist law mandated an enhanced sentence of life imprisonment.[24] In the course of rejecting the defendants'

---

[24] There is thus no merit to petitioner's reliance (Pet. Br. 23-24, 30, 46) on Section 1326(b)'s increase in the maximum by five or tenfold. The increase at issue in *Oyler* was far greater. See also *Hildwin*, 490 U.S. at 639-640 (holding that Sixth Amendment does not require that jury make finding of aggravating circumstance that comes into play after the defendant has been found guilty and that permits imposition of death sentence, and specifying that nothing in *McMillan* "suggests otherwise").

various constitutional challenges, the Court again emphasized that due process does not require that prior convictions that enhance punishment be charged by indictment or that defendants be given notice of them before trial on the substantive offense.[25]

Due process does require "reasonable notice and an opportunity to be heard relative to the recidivist charge." *Oyler*, 368 U.S. at 452.[26] But petitioner had

---

[25] Numerous courts of appeals have upheld against constitutional challenge various federal statutes that increase the maximum sentence authorized by a statute based on the existence of prior convictions or other aggravating factors. See, *e.g.*, *United States* v. *Rumney*, 867 F.2d 714, 718-719 (1st Cir. 1989) (enhancement under the Armed Career Criminal Act (ACCA) (former 18 U.S.C. App. 1202(a) (1982)) based on prior convictions upheld against constitutional challenge); *United States* v. *Hawkins*, 811 F.2d 210, 220 (3d Cir. 1987) (same); *United States* v. *Davis*, 710 F.2d at 106-107 (upholding dangerous special offender statute, former 18 U.S.C. 3575 (1976)); *United States* v. *Affleck*, 861 F.2d 97, 99 (5th Cir. 1988) (upholding enhancement under 18 U.S.C. 924(e) for defendant with prior convictions), cert. denied, 489 U.S. 1058 (1989); *Lowe*, 860 F.2d at 1378-1379 (upholding enhancement under 18 U.S.C. 924(e)); *Brewer*, 853 F.2d at 1326-1327 (upholding enhancement under ACCA); *United States* v. *Neary*, 552 F.2d 1184, 1190-1195 (7th Cir.) (upholding dangerous special offender statute, former 18 U.S.C. 3575 (1976)), cert. denied, 434 U.S. 864 (1977); *United States* v. *Segien*, 114 F.3d 1014, 1018 (10th Cir. 1997) (upholding enhancement under 18 U.S.C. 111(b) for assault where deadly weapon is used).

[26] The *Oyler* Court (368 U.S. at 452) explained that "[s]uch requirements are implicit within" the Court's decisions in *Chewning* v. *Cunningham*, 368 U.S. 443 (1962); *Reynolds* v. *Cochran*, 365 U.S. 525 (1961); and *Chandler* v. *Fretag*, 348 U.S. 3 (1954). The Court noted that those cases concerned the right to counsel, but reasoned that such a right would have been an

full notice and an opportunity to be heard on the question whether he had sustained an aggravated felony conviction. J.A. 5, 12. The Constitution does not also require that Congress make the prior crime an element of the offense that must be alleged in the indictment and established at trial. Because no serious constitutional question is raised by consideration of the aggravated felony at sentencing, principles of constitutional avoidance (Pet. Br. 28-29) do not justify construing Section 1326(b) to state a separate and independent offense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
WILLIAM C. BROWN
Attorney

JULY 1997

"idle accomplishment" absent notice and a right to be heard. 368 U.S. at 452. *McMillan* makes clear that that principle does not extend to petitioner's claim of a right to indictment and proof beyond a reasonable doubt for sentencing factors. 477 U.S. at 84.

APPENDIX*

1. 8 U.S.C. 1326 (1952), as enacted on June 27, 1952, ch. 477, Title II, ch. 8, § 276, 66 Stat. 229:

§ 1326. Reentry of deported alien

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter[1] or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

---

* In each version of the statute, the text that was deleted by the amendment is lined through and text that was added by the amendment is underlined.

[1] This reference and other references to other portions of the Immigration and Nationality Act (INA) and the code were altered slightly by the codifiers to conform with the designations in the code. Those alterations do not affect the substance of the statute, however, and are not otherwise noted in this appendix.

2. 8 U.S.C. 1326 (1988) (reflecting amendments made by Pub. L. No. 100-690, Title VII, § 7345(a), 102 Stat. 4471 (November 18, 1988)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens[2]

~~Any alien~~

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more

---

[2] The second clause in the catchline appears to have been added by the codifiers based on the title of the provision in the Anti-Drug Abuse Act of 1988 that added subsection (b) to the statute. See Pub. L. No. 100-690, § 7345, 102 Stat. 4471. The alteration in the code catchline has been carried over in subsequent codifications, although the title of the Immigration and Nationality Act does not appear to have been so amended.

than two years, or by a fine of not more than $1,000, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

3. 8 U.S.C. 1326 (1988 & Supp. II 1990) (reflecting amendments made by Pub. L. No. 101-649, Title V, § 543(b)(3), 104 Stat. 5059 (November 29, 1990)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be ~~guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000~~ fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under

title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

4. 8 U.S.C. 1326 (1994) (reflecting amendments made by Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (September 13, 1994)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who —

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than ~~5~~ 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than ~~15~~ 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

5. 8 U.S.C.A. 1326 (reflecting amendments made by AEDPA, Pub. L. No. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279 (April 24, 1996)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; ~~or~~

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both; or

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation

order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

6. 8 U.S.C.A. 1326 (reflecting amendments made by IIRIRA, Pub. L. No. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), 110 Stat. 3009-606, 3009-618, 3009-619, 3009-620, 3009-629 (September 30, 1996)):

§ 1326. Reentry of ~~deported~~ removed alien; criminal penalties for reentry of certain ~~deported~~ removed[3] aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been ~~arrested and deported, has been excluded and deported,~~ denied admission, excluded, deported, or removed or has departed the United States while an order of ~~exclusion or deportation~~ exclusion, deportation, or removal is outstanding and thereafter[4]

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to

---

[3] As noted above, the second clause of the catchline in the codified version of the statute apparently was added in 1988. When the title of Section 276 of the INA was amended by Congress to replace the term "deported" with "removed" the codifiers apparently altered the second clause of the catchline accordingly.

[4] Subsection (a)(1) was first amended by IIRIRA § 324(a) as follows:

(1) has been arrested and deported, has been ~~or~~ excluded and deported, or has departed the United States while an order of exclusion or deportation is outstanding and thereafter

110 Stat. 3009-629. IIRIRA § 308(d)(4)(J) then amended subsection (a)(1) "as amended by section 324(a)" in the manner set forth in the text above. 110 Stat. 3009-618.

his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously ~~excluded and deported~~ denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose ~~deportation~~ removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose ~~deportation~~ removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both; ~~or~~

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, and imprisoned for

a period of 10 years, which sentence shall not run concurrently with any other sentence or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both

For the purposes of this subsection, the term "~~deportation~~ removal" includes any agreement in which an alien stipulates to ~~deportation~~ removal during (or not during) a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2)[5] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the re-

---

[5] As amended by AEDPA, this cross-reference referred to a provision of the INA that authorized deportation of certain nonviolent offenders prior to completion of their sentences of imprisonment. See AEDPA § 438(a), 110 Stat. 1275 (amending Section 242(h) of the INA (8 U.S.C. 1252(h)) to include subsection (h)(2)). That section of the INA was amended by IIRIRA to address the issue of judicial review of removal orders, but a new section containing the same substantive provision relating to deportation of certain nonviolent offenders was simultaneously enacted through IIRIRA as Section 241(a)(4)(B) of the INA (to be codified at 8 U.S.C. 1231(a)(4)(B)). See IIRIRA §§ 305(a), 306(a)(2), 110 Stat. 3009-597, 3009-607. IIRIRA did not, however, correct the cross-reference in subsection (c) as reflected in the text above.

mainder of the sentence of imprisonment which was pending at the time of ~~deportation~~ removal without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

No. 96-6839

In The

Supreme Court of the United States

October Term, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

PETER FLEURY*
TIMOTHY CROOKS
Assistant Federal Public Defenders
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
(817) 978-2753
Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37 pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

I. AS A MATTER OF STATUTORY CONSTRUCTION, 8 U.S.C. § 1326(b)(1) AND (b)(2) MUST BE READ AS CREATING SEPARATE AND DISTINCT OFFENSES FROM THE OFFENSE DESCRIBED IN 8 U.S.C. § 1326(a), RATHER THAN SENTENCING ENHANCEMENTS OF THE OFFENSE DESCRIBED IN § 1326(a).

A. The Statutory Text and Structure of 8 U.S.C. § 1326(b)(2) Establish That It is a Separate and Distinct Offense from That Described in 8 U.S.C. § 1326(a).[1]

1. The Statute Itself.

The Government argues first that "[t]he text of 8 U.S.C. [§] 1326 reflects Congress's intent to define a single offense based on a deported alien's illegal reentry, and to vary the severity of the penalty according to the offender's criminal history before his deportation." Resp. Br. 12. In support of this argument, the Government points chiefly to the use of the phrase "[s]ubject to subsection (b)" in subsection (a) of § 1326, and the use of the phrase "[n]otwithstanding subsection (a)" in subsection (b) of § 1326. Resp. Br. 12-13. However, these phrases

---

[1] Contrary to the Government's suggestion, Resp. Br. 11 fn. 2, Petitioner does **not** contend that this Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985) "requires application of the four-factor test developed by the Fifth Circuit in *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986) [or] that that test is dispositive." Nor does Petitioner claim that the Fifth Circuit's application of the *Davis* test "represent[s] a wholly 'alternative analysis' " for deciding this question. Resp. Br. 20 fn.9. Rather, the *Garrett* factors represent a nonexclusive subset of factors courts have examined in deciding this question. *See, e.g., United States v. Forbes*, 16 F.3d 1294, 1298 (1st Cir. 1994) (*Garrett* factors are helpful, but not conclusive in resolving this question).

cannot bear the weight which the Government places upon them.

The Government posits that "the introductory clause, '[s]ubject to subsection (a),' conditions the severity of the penalty imposed under subsection (a) on any modification of the authorized penalty that is required by subsection (b)." Resp. Br. 12. But this phrase is just as likely to mean that both (a) and (b) are offenses, and that a prosecutor is not limited to prosecuting the crime described in (a) where she may charge the crimes described in (b).

Citing dictionary definitions of the word "notwithstanding," the Government also argues that "the phrase '[n]otwithstanding subsection (a)' authorizes imposition of the greater penalties specified in subsection (b) for a subset of aliens who violate subsection (a), in spite of the lesser penalty otherwise provided for in subsection (a)." Resp. Br. 13. But the Government's argument proves too much. Under the dictionary definitions cited by the government, the word "notwithstanding" signals a complete negation or rejection of the particular thing referenced. Thus, the phrase "[n]otwithstanding subsection (a)" indicates a **complete** rejection of subsection (a) – not just the partial rejection argued by the government (*i.e.*, the rejection of only the part pertaining to permissible punishments). Such a complete rejection is an indication that subsection (b) was meant to stand alone as a separate offense. At least one judge has so recognized. *See United States v. Vasquez-Olvera*, 999 F.2d 943, 948 (5th Cir. 1993) (King, J., dissenting), *cert. denied*, 510 U.S. 1076 (1994).

As the First Circuit, through a panel including then-Chief Judge Breyer, persuasively explained, it is

> just as likely, however, that subsection (b) incorporates the offense described in subsection (a), and simply adds the additional element regarding a prior conviction of a felony or aggravated felony . . . The fact that each subsection makes reference to the other is simply the logical way of indicating the relationship between the arguably two separate crimes.

Forbes, 16 F.3d at 1298 (citations omitted).

The Government also inaccurately argues that "the application of subsection (b) is predicated on a violation of subsection (a). . . . " Resp. Br. 14 (emphasis added). This is emphatically not so. Subsection (b) states that it applies "in the case of any alien described in" subsection (a). Although Congress could easily have provided that subsection (b) would apply in the case of a "conviction under subsection (a)" or in the case of a "violation of subsection (a)," it did not do so.[2] This failure to do so is significant since, "[w]hen Congress intended that the defendant have been previously convicted, it said so," by explicitly using words like "conviction" or "convicted." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 n.7 (1985).

Finally, Congress did not simply append the contents of § 1326(b) as an addendum to the already-existing § 1326(a), but rather made § 1326(b) a separate subsection, with a separate letter. This strongly counsels in favor of finding that a separate offense was intended. *See, e.g., United States v. Ryan*, 9 F.3d 660, 667 (8th Cir. 1993) ("lack of clear division into separate sections suggests

---

[2] This failure distinguishes the statute at issue in this case from the statute discussed by the Government in its brief – 21 U.S.C. § 841. Resp. Br. 14-15 fn.4. In that statute, Congress explicitly premised the enhanced penalties in § 841(b) upon a "violation" of § 841(a). Section 841 is also distinguishable from the statute at issue in this case in another important respect: § 841(a) is explicitly labeled "Unlawful acts," while § 841(b) is explicitly labeled "Penalties." The lack of such labels in § 1326 is significant. As one judge has noted, "Congress could have easily titled subsection (b) as a penalty provision, which it chose not to do; the failure to do so is noteworthy." *Vasquez-Olvera*, 999 F.2d at 949 (King, J., dissenting).

treatment of contents as a single offense"), *aff'd on reh'g en banc*, 41 F.3d 361 (8th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1082 (1995); *United States v. Hawkins*, 811 F.2d 210, 218-19 (3rd Cir.) (same), *cert. denied*, 484 U.S. 833 (1987).

2. The 1988 Amendment by Which § 1326(b) Was Added.

The Government's position is likewise unsupported by the text and structure of the 1988 amendment which added subsection (b) to § 1326. Pointing to the 1988 addition of the words "[s]ubject to subsection (b)," the Government then argues that "[i]f Congress had intended to create a new substantive offense through subsection (b), there would have been no reason to change the text of subsection (a). The text would have remained unaltered as a substantive matter, and subsection (b) would have been drafted in a parallel fashion to identify the elements of whatever new offense was intended." Resp. Br. 16.

As pointed out by the First Circuit, however, it is at least equally plausible that "the fact that each subsection makes reference to the other is simply the logical way of indicating the relationship between the arguably two separate crimes." *Forbes*, 16 F.3d at 1298. Moreover, there is at least one other plausible reason for the inclusion of the "[s]ubject to subsection (b)" language, namely: to forestall the claims of defendants that the Government was required to prosecute them for the less severely punished crime set out in § 1326(a), rather than the more harshly punished offenses set out in § 1326(b)(1) or (b)(2).[3]

---

[3] For examples of such claims, *see, e.g., United States v. Batchelder*, 442 U.S. 114 (1979) and *United States v. Jackson*, 805 F.2d 457 (2nd Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

The Government misplaces reliance on the fact that the 1988 amendment added the title "Criminal Penalties For Reentry of Certain Deported Aliens." Resp. Br. 15-16. All criminal laws involve the creation of penalties. For instance, Congress originally created 8 U.S.C. § 1326 along with a number of other offenses under Chapter 8 of the Immigration and Nationality Act of 1952. Chapter 8 was entitled "General Penalty Provisions." Pub. L. No. 82-414, 66 Stat. 271-280 (June 27, 1952). Likewise, 18 U.S.C. § 2119, the "carjacking" statute, was enacted in the "Anti Car Theft Act of 1992" under Subtitle A: "Enhanced Penalties for Auto Theft" and Section 101: "Federal Penalties for Armed Robberies of Autos." Pub. L. No. 102-519, 106 Stat. 3384 (October 25, 1992). *See also* 18 U.S.C. § 2332.

B. Subsequent Amendments to § 1326 Also Support the Conclusion That § 1326(b)(1) and (b)(2) Were Intended to Be New Offenses; and the Legislative History Does Not Support a Contrary Conclusion.[4]

1. The Legislative History Surrounding the Enactment of § 1326(b).

While Petitioner does not concede that it is proper to examine legislative history to clarify a textually ambiguous criminal statute, such an examination nevertheless does not compel the result urged by the Government. The

---

[4] Unlike the Government, Petitioner draws a distinction between an analysis of subsequent amendments to a statute and "legislative history." For Petitioner, the latter includes only the intermediate steps – *e.g.*, committee reports and floor debates – to the final product as enacted by Congress and signed into law by the President. Where the term "legislative history" is used in this brief and in Petitioner's opening brief, it is used with that understanding of the term.

Government begins its dissection of the legislative history by discussing two bills which were not enacted into law. Resp. Br. 21-22. However, as this Court has noted, "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969) (citations omitted); *cf. Puerto Rico Dept. Of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws.").

The Government also points to remarks of various sponsors of the Senate bill which was the precursor for the ultimate legislation adding § 1326. Resp. Br. 22-23. However, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *accord Consumer Product Safety Comm. v. GTE Sylvania*, 447 U.S. 102, 118 (1980); *see also Garcia v. United States*, 469 U.S. 70, 76 (1984) ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.") (citations omitted).

Indeed, Committee Reports on the bill are the type of legislative history viewed as most "authoritative" by this Court. *Garcia*, 469 U.S. at 76 (citations omitted). Yet the Government concedes that "[n]o Senate or House report was submitted with the final legislation." Resp. Br. 23 fn.11. Thus, those courts which found the legislative history of § 1326(b) unhelpful were right. *See Forbes*, 16 F.3d at 1298; *Vasquez-Olvera*, 999 F.2d at 946; *see also id.* at 949 (King, J., dissenting); *United States v. Campos-Martinez*, 976 F.2d 589, 592 (9th Cir. 1992).

2. Subsequent Amendments to § 1326.

The Government's arguments notwithstanding, Resp. Br. 24-25, Congress did more than simply "updat[e] the various fine provisions" of § 1326 in the 1990 amendments. Resp. Br. 25. As previously discussed, Pet. Br. 15-16, Congress also made the language of § 1326(a), (b)(1), and (b)(2) parallel, evidencing Congress's always-held intention that these provisions receive parallel treatment – *i.e.*, each as a separate offense.

Even more significantly, in the 1990 amendments Congress deleted the phrases "shall be guilty of a felony" and "upon conviction thereof" from § 1326(a). Had this statute remained as it was prior to 1990 – with a reference to § 1326(a) as a felony of which one could be convicted, but no similar reference in § 1326(b)(1) or (b)(2) – the Government would now be arguing that this difference in language supported its argument. Congress's purposeful **eradication** of this difference in language in 1990 therefore supports Petitioner's position.[5]

In addressing the 1994 amendments, the Government makes the following argument: under Petitioner's reasoning, the addition of the "three or more misdemeanors"

---

[5] Contrary to the Government's suggestion, Resp. Br. 25, the titles of the sections of the bill containing the 1990 amendments – "Increase in Fine Levels: Authority of the INS to Collect Fines" and "Criminal Fine Levels" – do not defeat Petitioner's argument. In Congress's collective mind, the thrust of the 1990 amendments was **not** to make § 1326(b)(1) and (b)(2) separate offenses, **because Congress believed it had already done so in 1988.** In Congress's collective mind, the only change that was being wrought was in the fine levels: hence the titles of the amending sections. In other words, Petitioner is not suggesting that, in the 1990 amendments, Congress **made** (b)(1) and (b)(2) separate offenses. Rather, Petitioner is arguing that, in these amendments, Congress **clarified** its 1988 intention to make (b)(1) and (b)(2) separate, free-standing offenses.

language to § 1326(b)(1) in 1994 would create yet another substantive offense, *i.e.*, illegal reentry after deportation following conviction for "three or more misdemeanors involving drugs, crimes against the person, or both." The Government then points to the title of the section containing the 1994 amendments – "Enhancement of Penalties For . . . Reentering, After Final Order of Deportation" – as inconsistent with such an intention. Resp. Br. 25-26.

The short answer is that the title of these amendments is perfectly consistent with the principal thrust of the 1994 amendments, namely: the increase of the maximum penalties for § 1326(b)(1) and (b)(2), from 5 and 15 years, to 10 and 20 years, respectively. Certainly Congress is under no obligation to include in the title of its amending legislation every single purpose which that legislation seeks to accomplish.

With respect to the 1996 amendments, the Government protests first that "Petitioner cites no legislative history or other authority to support his claim that [8 U.S.C. § 1326(b)(3), added in 1996] creates a new substantive offense, and is not merely a sentencing provision." Resp. Br. 27-28. Notably, the Government cites none to support the contrary position. An examination of the text of that provision clearly reveals that it is a new substantive offense.

The Government also attempts to discount the significance of the 1996 addition of § 1326(d), respecting collateral attacks of underlying deportation orders. Resp. Br. 28. However, the Government utterly fails to explain why Congress felt it necessary, in § 1326(d), to speak of "deportation order[s] described in subsection (a)(1) **or subsection (b)** of this section. . . . " (emphasis added), **if, in fact, the sole substantive offense is contained in subsection (a)**. The Government also completely fails to address Petitioner's argument that, since the text of

§ 1326(b) is itself devoid of any mention of "deportation order[s]," any deportation order "described in . . . subsection (b)" is solely through incorporation from subsection (a) – thus reinforcing the conclusion that Congress intended to incorporate the elements of subsection (a) into subsection (b), thereby making subsections (a), (b)(1), and (b)(2) each a separate, free-standing offense.

With respect to § 1326(b)(4), the Government admits that this provision is susceptible of interpretation as a new offense, rather than a sentencing enhancement, Resp. Br. 30; but then fails to address the illogic of Congress's putting a new substantive offense into a subsection with sentencing enhancements. It would make very little sense for Congress to have lumped together, into a single subsection of § 1326, two sentencing enhancements ((b)(1) and (b)(2)), and two substantive offenses ((b)(3) and (b)(4)). The more logical conclusion is that Congress saw no anomaly in adding (b)(3) and (b)(4) to § 1326(b) because it viewed each of the subdivisions of subsection (b) as setting out a new substantive offense.

The Government also makes much of the fact that, in the second set of 1996 amendments, Congress amended subsection (a), but not subsection (b), to extend it to aliens who "departed the United States while an order of exclusion or deportation is outstanding." Resp. Br. 30-31. The Government claims that "[b]y adding that provision to subsection (a), Congress made clear that the offense conduct in Section 1326 is defined by that Section 1326 subsection, not by the penalty enhancement provisions found in subsections (b)(2)." Resp. Br. 30-31.

What the Government overlooks is that there was no need for Congress to include such language in subsection (b), because any amendment of subsection (a) is automatically incorporated into (b). Subsection (b) applies "in the case of any alien described in [subsection (a)]. . . . " This

language incorporates the offense described in (a), however that offense might be defined. *See Forbes*, 16 F.3d at 1298; *Vasquez-Olvera*, 999 F.2d at 948 (King, J., dissenting).

Finally, Petitioner notes that the Government has offered no explanation for Congress's purposeful reference to the "**offenses** under section . . . 276(b) of the Immigration and Nationality Act (8 U.S.C. . . . 1326(b)). . . . " Pub. L. No. 104-208, 110 Stat. 3009, § 334 (Sept. 30, 1996) (emphasis added). The Government contends that because "[t]he 1994 statutory amendment that was the basis for Congress's directive amended only subsection (b), not subsection (a) [of § 1326,] [t]herefore, it was natural for Congress to cross-reference only that subsection in its directive." Resp. Br. 32. Yet this does nothing to explain Congress's use of the word "offenses" to describe the provisions of § 1326(b)(1) and (b)(2) – a word which "is a technical term in the criminal law, referring to a crime made up of statutorily defined elements." *United States v. LaBonte*, ___ U.S. ___, 117 S.Ct. 1673, 1683 (1997) (Breyer, J., dissenting) (citations omitted).

In sum, the subsequent amendments to § 1326, in conjunction with the text of that statute as first amended in 1988, lead to the conclusion that, in § 1326(b)(1) and (b)(2), Congress intended to create new, separate offenses, not merely sentencing enhancements of the offense found in § 1326(a). Nothing about the legislative history surrounding the 1988 (or subsequent) amendments alters that conclusion. Therefore, this Court should hold that 8 U.S.C. § 1326(b)(2) describes a separate and distinct offense from that described in § 1326(a), and that, therefore, the "aggravated felony" portion of § 1326(b)(2) is an element which must be charged in the indictment and proved beyond a reasonable doubt before a defendant may be subjected to the term of imprisonment set out in § 1326(b)(2).

C. At Best, the Statute in Question is at Least Ambiguous; and, in that Case, the Rule of Lenity Requires that § 1326(b)(1) and (b)(2) Be Read as Creating New Offenses.

The Government exhibits a fundamental misunderstanding of the rule of lenity. The Government claims that "the statute in this case does not implicate the principal purpose of the rule of lenity, *i.e.*, to ensure that criminal statutes will provide fair warning concerning criminal conduct rendered illegal." Resp. Br. 34 (internal quotation marks and citation omitted). At issue here, though, is not whether there is fair warning that the conduct is illegal. Rather, what is at issue is whether the defendant has fair warning of the **penalty** attached to the alleged illegal conduct set out in the indictment. *BMW of North America, Inc. v. Gore*, ___U.S.___, 116 S.Ct. 1589, 1598 (1996).

Furthermore, this Court has consistently applied the rule of lenity where "fair warning" was not the issue. *E.g., Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Toussie v. United States*, 397 U.S. 112, 122-23 (1970) (rule applied in determining when statute of limitations began); *cf. United States v. Bass*, 404 U.S. 336, 347-50 (1971) (fair warning only one basis of rule of lenity).

The Government also misunderstands how the rule of lenity operates. The Government argues that the rule of lenity should be applied with a view to what is most lenient for criminal defendants "as a general matter," rather than what is most lenient for a particular individual defendant. Resp. Br. 34. This argument is, however, firmly rebutted by this Court's opinion in *United States v. Granderson*, 511 U.S. 39 (1994), in which the Government argued, and this Court agreed, that, for the particular ambiguous statute at issue in that case, the rule of lenity would compel a different interpretation of the statute for certain defendants than the interpretation given to the

statute by the Court for the particular petitioner in that case. *See Granderson*, 511 U.S. at 57 n.15. *Granderson* thus stands for the propositions that the rule of lenity is defendant-specific; and that where a statute is ambiguous, it must be given the interpretation most beneficial to **the particular defendant under consideration**.

Building on its erroneous premise, the Government urges that the rule of lenity still compels the interpretation of the statute urged by it because "while a particular Section 1326 defendant who was indicted only under subsection (a) would be benefited by treating subsection (b) as a separate offense, future defendants would likely have more to lose than gain from th[at] interpretation." Resp. Br. 35 (internal quotation marks and citation omitted). Particularly, the Government refers to "the possible prejudice to a defendant when his prior conviction is disclosed at trial." Resp. Br. 34.

There is no merit to the Government's suggestion. First, as the Government itself recognizes, the rule of lenity is concerned with "the substantive scope of criminal statutes and whether a sentence has been authorized by law." Resp. Br. 34. Second, this Court has recently noted that any potential prejudice may be minimized to an acceptable level by an evidentiary stipulation, thus precluding the need for the prosecution to prove up the conviction by other means which might bring the prior offense conduct up before the jury. *See Old Chief v. United States*, ___ U.S. ___, 117 S.Ct. 644 (1997).

In sum, the language and structure of § 1326 compel the conclusion that Congress intended to create new, separate offenses in § 1326(b)(1) and (b)(2), not merely sentencing enhancements of the offense described in subsection (a). Even if there is any ambiguity, however, the rule of lenity likewise compels the same conclusion in

this case. Therefore, this Court should so hold, and, consistent with that holding, should vacate the judgment of the Fifth Circuit in this case and remand for further proceedings.

II. THE CONSTITUTION REQUIRES THAT, IN A FEDERAL CASE, WHENEVER THE MAXIMUM IMPRISONMENT RANGE IS INCREASED BASED ON A FACT, THAT FACT MUST BE ALLEGED IN THE INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT IN A JURY TRIAL

A. The Fact that Petitioner Was Indicted for a Felony Offense is Irrelevant.

The Government first argues that the Petitioner's right to a grand jury indictment has not been violated, because Petitioner was prosecuted by indictment, and because the enhancement does not change the nature of the offense from a misdemeanor to a felony. Resp. Br. 36 fn. 18. The fallacy of this argument is easily shown: if a person is in fact charged by indictment for a misdemeanor offense, he may not be punished for a felony if the facts, or elements, that justify the felony punishment are not alleged.

At common law an indictment for larceny must allege the value of the thing taken, so "that it may appear whether it be grand or petit larciny [sic]; and whether entitled to the benefit of clergy. . . . " 4 W. Blackstone, *Commentaries on the Laws of England*, Ch. 23. Further, even if the indictment alleged a felony, it had to allege facts to indicate whether benefit of clergy, which excused the offender from the death penalty for the grand larceny, could apply. *Id.* This Court also has held that where an indictment fails to allege value, the defendant cannot suffer the increased punishment based on value. *Tinder v. United States*, 345 U.S. 565, 569 (1953). Thus the right to

have the facts alleged in the indictment is not based on the fact that the offense is labeled a felony, but on the potential for an increased penalty. *See Schooner Hoppet and Cargo v. United States*, 11 U.S. 389, 394 (1932); Pet. Br. 39-48.

B. Supreme Court Authority.

1. *McMillan v. Pennsylvania*.

The Government disputes the idea that the holding in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) was predicated upon the fact that the statute there did not enhance the maximum sentence. Resp. Br. 39-40. But the Court was explicit in limiting its holding to facts which determine the severity of a sentence within a sentence range. *Id.* at 82, 83 & 87-88.

Furthermore, the difference between *McMillan* and *Patterson v. New York*, 432 U.S. 197 (1977), on the one hand, and *In re Winship*, 397 U.S. 358 (1970), *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *Specht v. Patterson*, 386 U.S. 605 (1967) on the other, controls the outcome of this case. *See McMillan*, 477 U.S. at 91. The difference is that in *McMillan* and *Patterson*, the statutes did require proof beyond a reasonable doubt of those facts that the legislature had decreed were necessary to justify the maximum punishment; whereas, in *Winship*, *Mullaney*, and *Specht*, the statutes in question did not. *McMillan*, 477 U.S. at 82-84; *Patterson*, 432 U.S. at 206, 212-216; *Winship*, 397 U.S. 360; *Mullaney*, 421 U.S. at 706 (Rehnquist, J., dissenting); *Specht*, 386 U.S. at 607-10.

2. *Hildwin, Spaziano,* and *Walton*.

The Government mistakenly relies upon *Hildwin v. Florida*, 490 U.S. 638 (1989), *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Walton v. Arizona*, 497 U.S. 639 (1990).

Resp. Br. 36. In each of those cases, every fact necessary to put the person in the range of punishment which included a possible death penalty was alleged in the indictment and proved to a jury beyond a reasonable doubt. *Hildwin*, 490 U.S. at 638-39; *Spaziano*, 468 U.S. at 450-51; *Walton*, 497 U.S. at 645. These three cases held only that it is not necessary that the jury make the fact findings that determine the ultimate sentence. *Hildwin*, 490 U.S. at 640-41; *Spaziano*, 468 U.S. at 460; *Walton*, 497 U.S. at 648-49.

3. *Specht*.

The Government argues that *Specht v. Patterson* does not support Petitioner's cause. But the Court in *Specht* distinguished the issue there from the issue in *Williams v. New York*, 337 U.S. 241 (1949). In *Williams*, the Court was faced with sentencing procedures to determine the actual punishment, albeit the death penalty, within a range of punishment established for the offense of conviction. *Specht*, 386 U.S. at 606-08. On the other hand, in *Specht* the facts found by the jury established one range of punishment, but a new, higher maximum punishment could be assessed based on "a new finding of fact." *Id.* at 608.

4. *Parke v. Raley* and *Addington v. Texas*.

The Government also relies upon this Court's decision in *Parke v. Raley*, 506 U.S. 20 (1992) to support its assertion that *Addington v. Texas*, 441 U.S. 418 (1979) "is simply irrelevant." Resp. Br. 38 fn. 20. *Parke* is no support for this position. The Kentucky statute at issue in *Parke* did require that the recidivist enhancement be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Price v. Commonwealth*, 666 S.W.2d 749 (Ky. 1984); *Parke*, 506 U.S. at 23. *Parke* dealt only with the issue of

whether a prior conviction would be presumed to be valid. *Id.* at 28. Thus, *Parke* is irrelevant.

5. *Graham v. West Virginia* and *Oyler v. Boles*

The issue in *Graham v. West Virginia*, 224 U.S. 616 (1912), was whether the allegation of the prior conviction used for enhancement must be included in the indictment charging the new offense. The issue in *Oyler v. Boles*, 368 U.S. 448 (1962), was whether the defendant must receive notice of the recidivist enhancement prior to trial. In both cases the defendants were formally charged by information[6] and the statutes required the state to prove the prior convictions to a jury. *Graham*, 224 U.S. at 621; *Oyler*, 368 U.S. at 450 & 453.

Contrary to the Government's assertion, Resp. Br. 40-44, Petitioner does not contend that the Constitution requires recidivist enhancements to be included in the same indictment that charges the underlying offense. Furthermore, Petitioner's argument does not turn on whether a prior conviction used to enhance a sentence is labeled an "element" of the offense in the traditional

[6] The Government incorrectly asserts that the "Court's ruling in *Graham* that the State need not allege the prior convictions in an indictment was not based on the inapplicability of the right to indictment by a grand jury to the States." Resp. Br. 42 fn. 23. The Government partially quoted the Court's rationale, but left out the following: "And it cannot be contended that in proceeding by information instead of by indictment, there is any violation of the requirement of due process of law. *Hurtado v. California*, 110 U.S. 516 [1884]; . . ." *Graham*, 224 U.S. at 627 (citations omitted). The Court simply pointed out that there is no need for an indictment charging anew the offense the defendant has already been convicted of, and the fact of the previous conviction can be alleged by information.

sense. *See, e.g., People v. Sickles*, 156 N.Y. 541, 546-47, 51 N.E. 288, 290 (1898).

The Court in *Graham*, as pointed out by the Government, Resp. Br. 42, did state that a bifurcated procedure was valid in part because the allegation of a prior conviction "does not relate to the commission of the offense, but goes to punishment only." *Graham*, 224 U.S. at 629. This passage does not support the Government's position. The statement that the previous conviction does not relate to the new offense means only that the existence or not of a prior conviction is unrelated to whether or not the defendant has committed the newly alleged conduct. The statement that the prior conviction "goes to punishment only" means nothing more than that the prior offense itself need not be proved anew, and the defendant has no double jeopardy protection from the enhancement based on the prior conviction because he is not being punished for that offense. The fact of the prior conviction "goes to the punishment only" for the new offense, because it aggravates the guilt for the new offense. *McDonald v. Massachusetts*, 180 U.S. 311, 312-13 (1901); *Moore v. Missouri*, 159 U.S. 673, 676-77 (1895).[7]

C. Courts Did Not Traditionally Sentence Above the Maximum Based on Prior Convictions Absent Formal Allegations and Jury Findings.

It is not true, as the Government asserts, Resp. Br. 39, that here the legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment" and prescribed an effect for that factor. Resp. Br. 38. Nor is 8 U.S.C. § 1326(b)(2) a "congressional

[7] In both *Moore* and *McDonald*, the prior convictions were alleged in the indictment and found by a jury. *Moore*, 159 U.S. at 673; *McDonald*, 180 U.S. at 311 & 313.

codification of traditional sentencing factors. . . . " Resp. Br. 39. Sentencing courts generally considered prior convictions as a factor in assessing punishment only **within** a range prescribed for the offense of conviction. *See* Pet. Br. 33-39.

D. Dangerous Special Offender Statute.

The Government next relies upon circuit authority upholding the validity of the short-lived "dangerous special offenders" statute, 18 U.S.C. § 3575 (repealed). Resp. Br. 39, fn. 21. This Court never passed on the constitutionality of the "dangerous special offenders" statute with regard to the right to a jury, the burden of proof, or the right to indictment.[8]

E. Other Authority.

The Government claims that many of the cases cited by Petitioner concern statutory requirements that a prior conviction be proved as an element of the offense. But the

---

[8] Furthermore, the "dangerous special offenders" statute clearly set forth sentencing procedures completely different from normal sentencing procedures which afforded greater procedural protections to the defendant than normally required for sentencing. 18 U.S.C. §§ 3575 & 3576; *United States v. Stewart*, 531 F.2d 326, 332, 334 (6th Cir.) *cert. denied*, 426 U.S. 922 (1976). Thus, the "special offenders statute" did not offend "the established rule . . . [that] unless the statute designates a different mode of procedure, . . . the indictment or information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury. . . . " *Massey v. United States*, 281 F. 293, 297-98 (8th Cir. 1922) (citations omitted); *See Staples v. United* States, 511 U.S. 600, 605-06 (1994) (where there is a firmly embedded rule in the common law, or Anglo-American jurisprudence, Congressional silence will not suffice to supplant the rule). *Accord Liparota v. United States*, 471 U.S. 419, 426 (1985).

two cases cited by the Government, *Massey*, 281 F. at 296-97, and *Singer v. United States*, 278 F. 415, 419-20 (3rd Cir.), *cert. denied*, 258 U.S. 620 (1922) did not involve statutory requirements of a jury finding.[9] Furthermore, the complete uniformity of the statutory and case law informs the Court as to the understanding of the Constitutional requirements. *Printz v. United States*, ___U.S.___, 117 S.Ct. 2365, 2370 (1997). *See also* Pet. Br. 34.

Arguably, 8 U.S.C. § 1326(b)(2) is not a recidivist statute. The statute punishes persons for actions deemed more dangerous because of their status as felons, not their incorrigibility as illegally entering aliens. Thus, 8 U.S.C. § 1326(b)(1) & (2) is much like 18 U.S.C. § 922(g), which punishes felons who possess a weapon. Therefore, the prior conviction is an element of the offense. *See Labonte*, 117 S.Ct. at 1683 (Breyer, J., dissenting).

But, whether it is labeled an element or not, in 8 U.S.C. § 1326(b), Congress deemed a prior conviction to be important enough to increase the maximum punishment to twenty years. The Constitution guarantees that facts deemed important enough to increase the statutory maximum punishment must, in a federal case, be alleged

---

[9] The statutes at issue required only that the prosecutor include the prior conviction in the indictment, information or affidavit. *Massey*, 281 F. at 296; *Singer*, 278 F. at 419-20. In *Massey*, the court overruled the defendant's objection to the use of the prior conviction at trial. The court did not rely upon any statutory requirement, but, like the court in *Sickles*, found the requirement that facts which increase punishment must be proved beyond a reasonable doubt so fundamental that it could not be dispensed with even if it prejudiced the defendant. *Massey*, 281 F.2d 296-98.

in the indictment, and proved beyond a reasonable doubt to a jury. That guarantee was violated in this case.

CONCLUSION

For the foregoing reasons, and those set out in Petitioner's opening brief, and the brief of Amicus Curiae NACDL, the judgment of the United States Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

Respectfully submitted,

PETER FLEURY*
TIMOTHY CROOKS
Assistant Federal Public
Defenders
600 Texas Street, Suite 100
Fort Worth, TX 76102-4612
(817) 978-2753
Counsel for Petitioner

**Counsel of Record for Petitioner*

(8)

No. 96-6839

Supreme Court of the United States

OCTOBER TERM, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER HUGO ROMAN ALMENDAREZ-TORRES

STEPHEN R. SADY
Chief Deputy Federal Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
503-326-2123

Counsel for Amicus Curiae

Of Counsel:
Barbara E. Bergman
University of New Mexico
School of Law
1117 Stanford Drive NE
Albuquerque, NM 87131
505-277-3304

40 P

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

CIRCUIT COURT CASES

DISTRICT COURT CASES

U.S. CONSTITUTION

STATUTES & RULES

UNITED STATES SENTENCING GUIDELINES

OTHER

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 9,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants charged in federal courts.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice. The Amicus Curiae Committee of the NACDL has discussed this case and decided this issue is of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.[1]

The importance of this case to the NACDL membership

---

[1]In accordance with Supreme Court Rule 37(6), counsel certifies that no counsel for a party authored this brief, and no person or entity other than the amicus curiae made a monetary contribution to the preparation or submission of this brief.

derives from several major interests. First, the case affects a large and growing class of defendants and potential defendants. Since 1991, the number of persons sentenced for Section 1326 violations has increased each year from 715 to 2,945.[2] The overwhelming majority of the Section 1326 sentences were imposed in the Ninth Circuit.[3] A ruling adverse to the Ninth Circuit's recognition of the statutory elements would affect charging practices and trial issues for great numbers of defendants.

The persons affected are also unusually vulnerable to excessive punishment. As aliens illegally in the country, they constitute a

---

[2]According to the United States Sentencing Commission's data, the increase in both raw numbers sentenced under Section 1326 and as a percentage of all persons sentenced was as follows:

1991	715	2.1%	1994	1,389	3.5%
1992	757	2.0%	1995	2,032	5.3%
1993	1,066	2.5%	1996	2,945	6.9%

The statistical information here and elsewhere in the brief is derived from public information maintained by the Sentencing Commission. U.S. Sentencing Commission, 1991-96 Datafiles, MONFY 91-96.

[3]The yearly totals in the Ninth Circuit in raw numbers and as a percentage of overall Section 1326 sentencings are as follows:

1991	399	53.1%	1994	810	58.3%
1992	396	52.3%	1995	1,262	62.1%
1993	602	56.9%	1996	1,835	62.3%

despised subgroup. Their criminal and alien status not only excludes them from the political system but makes them a lightening rod for fear and anger. This political vulnerability is reflected in the flurry of legislation in this area. For many years, Section 1326 remained untouched as a seldom-invoked, two-year, malum prohibitum status offense. Since 1988, the statute has been amended to increase the statutory maxima for those with felony convictions, first to five and fifteen years, then to ten and twenty years. The Sentencing Guidelines have been amended accordingly. While such legislative decisions are not at issue, judicial procedures and the scope of prosecutorial discretion should apply fairly to these outlanders.

The preservation of traditional rights is also at issue in this case. The Fifth Amendment right to indictment and the due process right to proof of each element of the offense beyond a reasonable doubt are diminished by the view of the Fifth Circuit.

The parties have consented to the filing of this amicus curiae brief. Consent letters from the parties have been forwarded to the Clerk of the Court.

SUMMARY OF ARGUMENT

The plain meaning of Section 1326 defines separate offenses

in subsections (b)(1) and (b)(2), requiring pleading and proof beyond a reasonable doubt. The statute incorporates by reference using the phrase "any alien described in such subsection" to state all the elements of a separate offense in each subsection. The statute itself provides nothing to detract from the traditional view that each ingredient of the offense must be pleaded and proved at trial.

The plain meaning view is strongly reinforced by the context and structure of the statute. The adjacent statute, Section 1325, contains two levels of punishment, the greater of which depends on a prior conviction which must be pleaded and proved beyond a reasonable doubt. Congress referred to subsection 1326(b) as an "offense" in subsequent legislation. The complexity of factual and legal questions to establish "subsequent to a conviction" and "aggravated felony" under immigration law militate in favor of a requirement of pleading and proof beyond a reasonable doubt.

The Ninth Circuit, from which over half the Section 1326 cases are prosecuted, views subsection 1326(b) as enumerating separate offenses. A ruling contrary to the Ninth Circuit position undercuts the separation of powers doctrine and the imperative to afford the executive branch the full range of its discretion in charging decisions and plea

negotiations. An array of policy considerations guide prosecutors' decisions whether and how to charge an illegal reentry case. Prosecutorial discretion is inappropriately limited by the stark options of no prosecution or the alternatives of a petty offense or the twenty-year maximum.

Traditionally, each fact that must be established to impose the maximum punishment must be charged as an element under the Fifth Amendment's Indictment Clause and proved beyond a reasonable doubt under the Fifth Amendment's Due Process Clause. The statute should not be construed to dilute the historical interposition of the grand jury and the protections of pleading and proof beyond a reasonable doubt.

ARGUMENT

IN THE STATUTE DESCRIBING CRIMES OF ILLEGAL REENTRY AFTER DEPORTATION, THE PHRASES "SUBSEQUENT TO A CONVICTION FOR COMMISSION OF A FELONY" AND "SUBSEQUENT TO A CONVICTION FOR COMMISSION OF AN AGGRAVATED FELONY" DESCRIBE ELEMENTS OF THE OFFENSE WHICH MUST BE PLEADED BY INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT.

A. The Plain Meaning Of The Statute: Subsections (b)(1) And (b)(2) Describe Separate Offenses.

In construing a statute, its plain meaning is the guiding

principle. *United States v. Gonzales*, 117 S.Ct. 1032, 1034 (1997); *Bailey v. United States*, 116 S.Ct. 501, 506 (1995). When the text speaks with clarity to an issue, in all but the most extraordinary circumstances, inquiry into the meaning of the statute is complete. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Section 1326 on its face creates separate offenses in subsection (b). Subsection 1326(a) describes certain aliens in subparagraphs (1) and (2). Subsection 1326(b), as added in 1988, stated:

> (b) Notwithstanding subsection (a) of this section, in the case of *any alien described in such subsection*--
>
> (1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be . . .
>
> (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be . . . . (emphasis added).

Incorporation by reference, using phrases such as "described in such subsection," is a standard tool of legislative drafting. Indeed, the immigration laws are rife with incorporations by reference.[4] The

---

[4]The immigration statutes, past and present, use the word "described" hundreds of times to incorporate lengthy passages by reference.

adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length. *Engel v. Davenport*, 271 U.S. 33, 38 (1926); *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 625 (1838).

The statute states on its face (with the incorporation highlighted):

> (b) Notwithstanding subsection (a) of this section, in the case of any alien *who*
>
> *(1) has been arrested and deported or excluded and deported, and thereafter*
>
> *(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,*
>
> *[3]* whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 5 years, or both;
>
> *[4]* whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title 18, imprisoned not more than 15 years, or both.

The statute unambiguously states separate elements, the addition of which increase the maximum punishments. All the elements of the offense are in subsection (b) itself. There is no suggestion of any other approach.

B. The Structure And Context Of The Statute Establish That Subsections (b)(1) And (b)(2) Describe Separate Offenses.

The statutory structure and context of Section 1326 support the conclusion that each subsection states a separate offense. *See Bailey*, 116 S.Ct. at 505-06; *Hubbard v. United States*, 115 S.Ct. 1754, 1758 (1995). Judicial construction of Section 1325, substantially predating the creation of subsection (b), established that prior convictions had to be pleaded and proved beyond a reasonable doubt. The same pattern is followed in subsection 1326(b). The unique Immigration and Naturalization Service definitions of "conviction" and "aggravated felony" militate in favor of treating the separate facts as necessary elements of the offenses, as does subsequent legislation.

1. The Parallel Statute, Prohibiting Evasion Of INS Inspection, Treats The Prior Conviction As An Element Of The Offense.

At the same time it first enacted Section 1326, Congress

created in their present form parallel crimes for entering without inspection, regardless of prior deportation. 8 U.S.C. §1325 (1994) (amended 1996). This statute includes an increase in the statutory maximum from six months to two years "for a subsequent commission of any such offense, ..."

The Ninth Circuit, by a panel including now-Justice Kennedy, found that the government's failure to prove a prior "conviction" foreclosed the two-year offense. *United States v. Arambula-Alvarado*, 677 F.2d 51, 52 (9th Cir. 1982). Applying the Supreme Court's requirement that criminal statutes must be narrowly construed in favor of the accused, the court held that "[a]bsent proof of a former 'conviction,' the appellant should not have been given a felony sentence." *Id.*

The Ninth Circuit clarified its Section 1325 decision, holding that proof of the "conviction" did not require a certified copy of the judgment; other evidence could suffice. *United States v. Arriaga-Segura*, 743 F.2d 1434 (9th Cir. 1984). In doing so, the court reinforced the holding that the prior conviction was an element of the offense: "The Government clearly must prove beyond a reasonable doubt more than 'a subsequent commission of any such offenses'; it

must prove an actual conviction." *Arriaga-Segura*, 743 F.2d at 1436.

Separate offenses have been applied in practice for years. When Congress promulgated subsection (b) in 1988, the legislature is presumed to have known the judicial interpretations of the sister statute and intended a consistent reading. *See generally Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); 2B Norman J. Singer, SUTHERLAND STAT. CONST. §51.01-03 (5th ed., 1992 and 1996 Supp.) (interpretation by reference to related statutes). The prosecutors and courts in the Ninth Circuit proceeded to apply the Section 1325 construction to Section 1326 without difficulty.[5]

2. The Ninth Circuit Has Consistently And Rationally Interpreted Subsection 1326(b) As Creating Separate Offenses Based On The Plain Meaning Of The Statute, Construction Of The Statute With Section 1325, And Prosecutorial Charging Practices.

The Ninth Circuit first addressed subsection 1326(b) in connection with the charging policy of the United States Attorney's office in the Southern District of California. The government initially charged the defendant, Mr. Arias-Granados, with reentry following a

[5]The government, in its opposition to certiorari in this case, noted the easy observance of the Ninth Circuit separate-offenses interpretation of subsection 1326(b). Brief of the United States in Opposition at 11.

deportation subsequent to a felony conviction, a "crime" then punishable by a statutory maximum of five years. *United States v. Arias-Granados*, 941 F.2d 996, 997 (9th Cir. 1991). Pursuant to plea negotiations, Mr. Arias-Granados entered a guilty plea "to one count of 8 U.S.C. §1326(a), simple reentry after deportation," punishable by a maximum of two years incarceration. 941 F.2d at 997. The parties and the court treated the offenses as separate.

The only issue on appeal was whether the sentencing guidelines should still reflect the higher punishment within the statutory maximum based on the higher guideline for reentry after a felony conviction. The court approved the exercise of charging discretion -- "A prior felony conviction is an element of the crime with which appellants were charged, 8 U.S.C. §1326(b)(1), but is not an element of the crime to which they pleaded guilty, 8 U.S.C. §1326(a)" -- and affirmed the sentences based on the applicability of the guideline enhancement as relevant conduct under U.S.S.G. §1B1.3(a)(4). *Arias-Granados*, 941 F.2d at 998. The court drew a clear line between charging discretion that limited the statutory maximum and application of the guideline range within that maximum sentence. *Id.*

Plea bargaining practice regarding different charges came

before the Ninth Circuit again in *United States v. Campos-Martinez*, 976 F.2d 589 (9th Cir. 1992). There, the defendant pleaded guilty to an indictment with no allegation of a prior conviction. The defendant asserted the failure to plead the element of subsection 1326(b)(1) that would increase the statutory maximum foreclosed a sentence in excess of two years. The Ninth Circuit agreed.

The court found the statutory interpretation in *Arias-Granados* was correct that "subsections 1326(a) and 1326(b)(1) describe different crimes with different elements and maximum sentences." *Campos-Martinez*, 976 F.2d at 591. The court also found that Section 1325, which the government conceded stated two separate offenses distinguished by a prior conviction, supported its interpretation of the face of the statute: "Sections 1325 and 1326 form the core of the illegal entry prohibitions of the United States Code, and both statutes provide that a previous criminal conviction may result in a longer sentence." *Campos-Martinez*, 976 F.2d at 591.[6] The court held the "indictment must include the element that the person was convicted of a prior felony." *Campos-Martinez*, 976 F.2d at 592.

---

[6]The court interpreted the statutes consistently based on similarities "in structure, operation, purpose, and subject matter." *Campos-Martinez*, 976 F.2d at 592.

In *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992), three defendants went to trial on indictments in the District of Washington that did not charge any prior offenses. The government did not plead or prove the requisite facts for a subsection 1326(b)(1) or (b)(2) offense. The court held that "the three subsections identify different crimes, the elements of which must be proven at trial and not simply at sentencing." *Gonzalez-Medina*, 976 F.2d at 571. In doing so, the court relied heavily on its earlier ruling in *Arias-Granados*, holding that "[b]ecause sections 1326(a) and 1326(b)(1) (and, a fortiori, 1326(b)(2)) constitute separate crimes -- and not merely a single offense with different sentencing criteria -- the government was obligated to put on evidence of the defendants' prior felony convictions if it intended to prosecute them under subsection 1326(b) instead of the lesser included offense of 1326(a)." *Gonzalez-Medina*, 976 F.2d at 572.

In the court of appeals with jurisdiction over the most felony Section 1326 prosecutions, the language and context of the statute establish that "§1326(a) and (b) stand alone, each with its own elements and sentencing provisions." *United States v. Oliver*, 60 F.3d 547, 553-54 (9th Cir. 1995). Recently, the Ninth Circuit reinforced its

view of the statute *en banc* when it upheld the dismissal of an indictment under subsection 1326(b)(2) for failure to properly allege an aggravated felony. *United States v. Gomez-Rodriguez*, 96 F.3d 1262, 1265 (9th Cir. 1996) (en banc).

3. The Unique And Complex Proof Requirements Regarding "Convictions" And "Aggravated Felonies" Under INS Law Militate In Favor Of Treatment Of Subsection (b) As Stating Separate Offenses.

At the time Congress promulgated subsection (b), immigration law provided unique and complex potential grounds for defenses which militate in favor of requiring pleading and proof beyond a reasonable doubt. Under applicable immigration law, a "conviction" was not final unless all appeals were exhausted or the period to appeal had expired. Further, amendments to the definition of "aggravated felony" created factual questions regarding charging and proof.

a. The finality of a conviction under subsection 1326(b) is a potentially complex question of law and fact.

Under subsection 1326(b), the increase in maximum sentence applies only where the deportation is "subsequent" to a felony or aggravated felony. In *Marino v. INS*, 537 F.2d 686, 691 (2d Cir. 1976), the court provided a narrow definition of "convicted" under the immigration laws:

> [A]n alien is not deemed to have been "convicted" of a crime under the Act until his conviction has attained a substantial degree of finality...such finality does not occur unless and until direct appellate review of the conviction (as contrasted with collateral attack) has been exhausted or waived.

The INS adopted regulations applicable to immigration crimes codifying the case law.[7] The agency's construction of the term is entitled to deference. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).[8]

The question whether the deportation is "subsequent" to a conviction becomes a relatively complex factual question. If, for example, the deportation follows quickly upon the imposition of a sentence to time served or probation, the conviction will not be final at

---

[7]53 Fed.Reg. 9,281, 9,298 (March 28, 1988) (codified in 8 C.F.R. §242.2(b) (1989)).

[8]Congress adopted a new version of "conviction" in 1996. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, §322, 110 Stat. 3009-1570, 3009-1703 (1996) (codified at 8 U.S.C. §1101(a)(48) (1996)). The INS later withdrew 8 C.F.R. §242.2(b). 62 Fed.Reg. 10,312, 10,382 (March 6, 1997). The new definition would not apply to Mr. Almendarez under the Ex Post Facto Clause. The importance of the earlier definition of "conviction" is the light it sheds on the offenses created by Congress in 1988 by promulgating subsection (b).

the time of the deportation because the time within which to appeal may not have expired.

If an appeal is filed, the conviction may not become final for months, or years, while the case wends its way through the appellate courts. In fact, there is nothing in the record before this Court to establish that Mr. Almendarez's burglary convictions were not appealed and still pending at the time of his deportation.

The need to focus the parties and the court on when the judgment was final, and on the potential "subsequent" defenses, militates in favor of treating as an element facts which may result in a much lower statutory maximum.

b. Whether a felony is "aggravated" under subsection 1326(b)(2) is a potentially complex question of law and fact.

An additional factual matter raised in subsection 1326(b) is whether the prior offense is a felony or an aggravated felony. Congress provided a definition of aggravated felony at 8 U.S.C. §1101(a)(43) (1996). The definition of aggravated felony has changed several times

since the promulgation of 8 U.S.C. §1326(b).[9] The Ex Post Facto Clause, as well as the statutory effective date, limit prosecutions where the "aggravated felony" definition becomes broader, and inclusive of the defendant, subsequent to the commission of the offense.[10] The function of focusing both the prosecution and the defense on the question by formal notice and proof beyond a reasonable doubt favors consideration of the fact -- "aggravated felony" -- as an element of the offense.[11]

---

[9]In 1988, the initial definition generally included murder, drug trafficking, and weapons trafficking. Pub. L. No. 100-690, §7342, 102 Stat. 4469, 4469-70. In 1990, the definition expanded to include crimes of violence for which a term of at least five years imprisonment was imposed. Immigration Act of 1990, Pub. L. No. 101-649, §501, 104 Stat. 4978, 5048. In 1996, the definition was once again altered to be more expansive. Antiterrorism And Effective Death Penalty Act Of 1996, Pub. L. No. 104-132, §440(e), 110 Stat. 1,259, 1,277.

[10]*See, e.g., United States v. Gomez-Rodriguez*, 96 F.3d 1262 (9th Cir. 1996) (en banc); *United States v. Munoz-Cama*, 47 F.3d 207, 208-09 (7th Cir. 1995).

[11]The need for notice and attention to this element in a criminal case is especially important for three reasons: 1) INS law is a specialty area not easily accessible to the uninitiated; 2) Section 1326 defendants are almost always unable to retain private immigration lawyers; and 3) the numbers of immigration specialists available through the Criminal Justice Act is limited.

4. Subsequent Immigration Legislation Supports The Requirement Of Pleading And Proof Of Subsections (b)(1) And (b)(2).

In 1996 Congress added subsections (b)(3) and (b)(4) to Section 1326.[12] Each creates a new offense, mirroring the patterns of subsections (b)(1) and (b)(2). The only difference is that, because of minor changes in the description of the aliens, incorporation by reference is not used. The subsequent legislation demonstrates the legislative view of the relevant factors as elements of the offense.

Further, in 1996 Congress directed the Sentencing Commission to address the new statutory maxima for subsection 1326(b) violations created in 1994. In doing so, Congress referred to subsections 1326(b)(1) and (b)(2) as "offenses."[13] Although subsequent to enactment, the reference reflects the view that the subsections are separate crimes.

In the 1996 amendments, Congress used "penalties" in a broad, generic sense denoting the consequences of punishable offenses consisting of a number of elements. 8 U.S.C. §1326(c). This sheds

---

[12]Pub. L. No. 104-132, §401(c), 110 Stat. 1258, 1268; Pub. L. No. 104-208, §305, 110 Stat. 3009-1570, 3009-1666.

[13]H.R. Conf. Rep. No. 104-828, §334(a) (1996).

light on the use of the Section 1326 title of "criminal penalties for certain deported aliens." Rather than indicating a penalty section, "penalty" is used, as it is throughout immigration statutes, in its general sense. This supports the suggestion that some courts have read too much into the title:

> The bifurcated structure of §1326 and the apparent incorporation of the elements of subsection (a) into subsection (b) might also suggest that Congress intended the broad title of the offense ("reentry of deported alien") to apply to both separate offenses in the different subsections.

United States v. Forbes, 16 F.3d 1294, 1298 (1st Cir. 1994) (citing *United States v. Vasquez-Olvera*, 999 F.2d 943, 949 (5th Cir. 1993) (King, J., dissenting)); *see also United States v. Vieira-Candelario*, 811 F.Supp. 762, 767 (D.R.I. 1993).

C. The Separation Of Powers Doctrine And Traditional Respect For Full Prosecutorial Discretion In Charging Decisions Support Construction Of Subsections (b)(1) And (b)(2) As Separate Offenses.

Congress intended to create separate offenses in subsections (b)(1) and (b)(2) to facilitate the full exercise of prosecutorial discretion. Prior to 1988, the only cases construing Section 1325 treated the two offenses as separate and amenable to the exercise of

prosecutorial discretion. The full range of charging discretion is especially appropriate where many more people are guilty of the status offense than can be processed through the courts or housed in the prisons. Under both the constitutional separation of powers doctrine and the statutory approval of prosecutorial discretion, Congress gave full powers to the executive branch to carry out the laws.

The executive branch has exclusive discretion to decide whether and how to prosecute a case. *United States v. Armstrong*, 116 S.Ct. 1480, 1486 (1996); *United States v. Nixon*, 418 U.S. 683, 693 (1974). This discretion includes whether to bring a charge with a higher or lower statutory maximum. *United States v. Batchelder*, 442 U.S. 114, 124 (1979). The use of charge bargaining has been specifically endorsed by this Court as "an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971).

Exercise of charging discretion in the resolution of cases is explicitly endorsed in and contemplated by the relevant statutes and sentencing guidelines. The Federal Rules of Criminal Procedure anticipate that the dismissal of charges may result from plea agreements. Fed. R. Crim. P. 11(e)(1)(A). The Sentencing Guidelines

expressly contemplate that, as a result of charging discretion, the statutory maximum may become the guideline sentence, regardless of the applicability of a higher guideline range. U.S.S.G. §5G1.1(a) (1995). The Sentencing Commission specifically recognized that oversight of agreements calling for dismissal of charges or an agreement not to pursue potential charges "does not authorize judges to intrude upon the charging discretion of the prosecutor." U.S.S.G. §6B1.2, comment. (1995).[14]

The radical changes in criminal immigration law have required creative prosecutorial approaches. For decades, many thousands of aliens have been deported. Many thousands of these aliens returned to the United States, drawn by financial need, family connections, and -- sometimes -- the desire to continue criminal activities. Prior to 1988, with a two-year maximum sentence for reentry and parole guidelines substantially lower, prosecutors generally brought charges in only the most aggravated cases. These were easily disposed of as mala

---

[14]With respect to plea negotiations, the Commission basically left matters as they were when the guideline system was promulgated. *See* William W. Wilkins, Jr., and John R. Steer, *Relevant Conduct: The Cornerstone Of The Federal Sentencing Guidelines*, 41 S.C.L.Rev. 495, 499 (1990); Stephen Breyer, *Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 30 (1988).

prohibita, regulatory-type offenses.[15]

The stakes were substantially increased in 1988 with the creation of the crimes of reentry after a felony, punishable by a maximum of five years incarceration, and reentry after an aggravated felony, punishable by a maximum of fifteen years incarceration. Shortly thereafter, the statutory maxima were increased to ten years and twenty years, respectively, transforming the offenses from Class E felonies to Class C felonies. 18 U.S.C. §3559(a)(3) and (b). Prosecutors had to decide how to allocate scarce resources where prison beds would be unavailable to other offenders; an almost bottomless source of potential defendants waited in prisons and neighborhoods, as well as at the border; and defendants facing terms of many years in prison were more likely to litigate fully.

Further complicating the prosecutor's decision is the vast array of factual settings. For example, there is no temporal limitation on the prior deportation, so an alien who has lived lawfully in the country with his family for thirty years after a probationary sentence for a small drug

---

[15]*United States v. Pena-Cabanillas*, 394 F.2d 785, 788-89 (9th Cir. 1968) (Section 1326 is a regulatory statute that describes a "typical mala prohibita offense"), *accord United States v. Henry*, 111 F.3d 111, 113-14 (11th Cir. 1997) (citing cases); *but see United States v. Anton*, 683 F.2d 1011 (7th Cir. 1982) (lone circuit requiring proof of criminal intent).

transaction is treated under the Guidelines the same as a bank robber who made express threats of death during the robbery.[16] The INS practice of scouring state jails and prisons for previously-deported aliens frequently results in mandatory, consecutive federal sentences because the Guidelines provide for concurrency or partial concurrency only where the former sentence is unexpired. U.S.S.G. §5G1.3 (1995). Aliens themselves are uniformly confused and incredulous regarding the time they face -- in fact, for several years after the change in the law, official Immigration and Naturalization forms erroneously listed the maximum sentence for reentry as being only two years imprisonment.[17]

Because Congress created separate crimes, the exercise of charging discretion provides a solution for the very limited number of

---

[16]*Compare* U.S.S.G. §2B3.1(a), (b)(1), and (b)(2)(F) (1995) *with* U.S.S.G. §2L1.2(a) and (b)(2) (1995).

[17]The circuit courts of appeals have uniformly held that the INS's erroneous advice in the Form I-294 regarding the statutory maximum is neither a defense nor a basis for downward departure. *See, e.g., United States v. Thomas*, 70 F.3d 575, 576 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1370 (1996); *United States v. Cruz-Flores*, 56 F.3d 461, 463-64 (2d Cir. 1995) ("However inexcusable it may have been for the government to continue to use outdated notices, every circuit court to consider this issue has found that receipt of an erroneous Form I-294 does not provide a basis for limiting a defendant's sentence to two years"); *United States v. Ullyses-Salazar*, 28 F.3d 932, 936-37 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1367 (1995).

cases that could otherwise be prosecuted to the full extent of the law. In several districts, United States Attorneys have implemented programs whereby many more aliens can be prosecuted by making an early and desirable guilty plea available. In the District of Oregon and the Southern District of California, the United States Attorneys responded to the large number of potential illegal reentry cases by charging a lesser offense in exchange for rapid dispositions.[18] The Ninth Circuit has expressly approved the Southern District of California "fast track" policy:

> In light of the overall crime problem in the Southern District of California, the government chose to allow §1326(b) defendants the opportunity to plead to a lesser offense, if done so at the earliest stage of the case. Like the district court, we find absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice. The policy benefits the government and the court system by relieving court congestion.

United States v. Estrada-Plata, 57 F.3d 757, 761 (9th Cir. 1995).

The results of these charging policies are readily apparent. In the Ninth Circuit, the number of Section 1326 prosecutions increased

---

[18]Allen D. Bersin, "Reinventing Immigration Law Enforcement In The Southern District Of California," Federal Sentencing Reporter, Vol. 8, No. 3 (March/April 1996) at 256; Dave Hogan, "Illegal Reentry Cases Soar In Oregon," *The Oregonian*, March 6, 1995, at B-1.

from 399 to 1,835 between 1991 and 1996. Of the 1,436 increase in sentences, 876 (61%) of the cases were from the District of Oregon and the Southern District of California.

Congress acted rationally and well within the scope of historical practice in providing prosecutors with several crimes that could be applied to a single fact situation. Section 1326 should be construed consistently with the separation of powers doctrine to provide the executive branch with wide discretion in charging criminal aliens.

D. Construction Of Subsections (b)(1) And (b)(2) As Separate Offenses Respects The Rights To Grand Jury Indictment And Proof Of Elements Beyond A Reasonable Doubt.

Section 1326 should be read consistently with historical, procedural, and constitutional requirements of indictment and proof. Due process and the Sixth Amendment require that the government prove, and the jury find beyond a reasonable doubt, each element of an offense. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). Criminal statutes routinely require proof of a prior conviction beyond a reasonable doubt. *See Lewis v. United States*, 445 U.S. 55 (1980); *Moore v. Missouri*, 159 U.S. 673, 676-77 (1895); LaFave and Scott, 1 SUBSTANTIVE CRIMINAL LAW (West 1986) §1.8

at 69.

The Fifth Amendment requires that federal felonies be charged by indictment. U.S. Const. amend. V.[19] The traditional requirements that every ingredient of an offense must be charged and proved beyond a reasonable doubt are of ancient provenance. *United States v. Gaudin*, 115 S.Ct 2310, 2313-15 (1995); *Smith v. United States*, 360 U.S. 1, 9 (1959).[20]

The historical practices have coalesced into federal procedural rules which require an indictment stating the essential facts constituting the offense charged (Fed. R. Crim. P. 7(c)(1)) and, at the time of a guilty plea (not sentencing), advice regarding the nature of the charge and maximum punishment (Fed. R. Crim. P. 11(c)(1)). The Court has recognized that elements that increase statutory maxima are subject to constitutional protections. *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986); *Mullaney*, 421 U.S. at 698-99. The elements interpretation of subection 1326(b) is supported by constitutional,

---

[19]*Cf. Graham v. West Virginia*, 224 U.S. 616, 627 (1911) (prior conviction could be charged by information because right to grand jury indictment is inapplicable to the states under *Hurtado v. California*, 110 U.S. 516 (1884)).

[20]*See Patterson v. New York*, 432 U.S. 197, 215 (1977); 1 Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, at 281 (1883).

procedural, and historical norms.

E. The Decisions From Other Circuits Misapply Controlling Rules Of Construction.

The circuit courts outside the Ninth Circuit have found subsection 1326(b) creates a "sentence enhancement." *United States v. Valdez*, 103 F.3d 95, 97-98 (10th Cir. 1996) (citing cases). The plain meaning of the statute and its context contradict that position. Two of the leading cases adopt an incorrect analysis in reaching their conclusion.

1. The Fifth Circuit, And Those Relying on It, Adopted An Analysis Unsuited To The Question Before The Court.

In *United States v. Vasquez-Olvera*, 999 F.2d 943, 945 (5th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1996), the Fifth Circuit, in both the majority opinion and the dissent, adopted an analytical framework based on an Armed Career Criminal Act case, *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986). The *Davis* court, in turn, derived its analysis from *Garrett v. United States*, 471 U.S. 773 (1985). *Davis*, 801 F.2d at 756. Although there is overlap, the *Davis/Vasquez-Olvera* approach is not helpful in the present case.

In *Garrett*, this Court considered whether proof of facts

supporting a predicate offense for a Continuing Criminal Enterprise conviction violated the Double Jeopardy Clause. The Court did not purport to create a methodology for determining what ingredients of an offense must be pleaded and proved. The double jeopardy analysis sheds little light on the construction of Section 1326. Mr. Almendarez is not arguing that his prior burglary conviction forecloses prosecution as a matter of double jeopardy.

As stated by the *Vasquez-Olvera* dissent, the *Garrett* methodology reaches the result Mr. Almendarez seeks: 1) incorporation by reference renders subsection 1326(b) a unitary offense; 2) the degree of increase forecloses treatment as a multiplier; 3) the title does not create a separate penalty provision; and 4) as all agree, no separate procedures are provided. *Vasquez-Olvera*, 999 F.2d at 948-49. The same result is achieved through the plain meaning and context of the statute, informed by the strict construction of criminal statutes and the rule of lenity.

2. The First Circuit, And Those Relying On It, Failed To Apply The Applicable Policies Requiring Treatment Of Subsections (b)(1) and (b)(2) As Separate Offenses.

The First Circuit found Section 1326 to be ambiguous based

on its language and structure. *United States v. Forbes*, 16 F.3d 1294, 1298 (1st Cir. 1994). Then, instead of applying the rules for construction of ambiguous criminal statutes, the court found the policy against introduction of prior convictions to be decisive. *Forbes*, 16 F.3d at 1299-1301.

Once ambiguity is found, the narrow construction of criminal statutes and the rule of lenity require relief for the defendant. This Court requires strict construction of what constitutes a crime under the immigration laws. *United States v. Campos-Serrano*, 404 U.S. 293, 297-98 (1971). The definition of criminal offenses is also subject to the rule of lenity, whereby the interpretation saving the individual defendant from prison is favored. *Granderson v. United States*, 511 U.S. 39, 54 & n.12 (1994); *Ratzlaff v. United States*, 510 U.S. 135, 148 (1994); *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).

Even beyond Mr. Almendarez's particular circumstances, the policies cited by the *Forbes* court incorrectly balance the interests of defendants generally. The constitutionally-based interests in grand jury indictment and proof beyond a reasonable doubt alone override other interests. The dangers posed by proof of prior convictions have been substantially mitigated by the Court's ruling in *Old Chief v. United*

States, 117 S.Ct. 644 (1977) (stipulation to conviction obviates proof of the offense). In 1996, 98.2% of all Section 1326 defendants pleaded guilty. The number of defendants going to trial is minuscule compared to those benefitting from charging discretion or defenses based on the elements of the offenses.

CONCLUSION

The plain meaning of the statute is that subsections 1326(b)(1) and (b)(2) describe separate offenses. This result is strongly supported by the structure of the statute, traditional charging discretion, and constitutional norms. The sentence in excess of the statutory maximum of two years should be reversed.

Respectfully submitted,

Stephen R. Sady
Chief Deputy Federal Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
503-326-2123

Counsel for Amicus Curiae, NACDL